

WE well knowing the great learning, ability and judgment, of the author, do allow and approve of the printing and publishing of this book, entituled, *Reports of cases argued and adjudged in the courts of King's Bench and Common Pleas, taken and collected by the Right Honourable Robert Lord Raymond, deceased, late Lord Chief Justice of the court of King's Bench.*

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REPORTS OF CASES

ARGUED and ADJUDGED in the COURTS of
KING'S BENCH
AND
COMMON PLEAS,

In the REIGNS of

The late King *William*, Queen *Ann*, King
George the First, and King *George* the
Second.

Taken and Collected

By the Right Honourable *ROBERT* Lord *RAYMOND*,
late Lord Chief Justice of the Court of King's Bench.

The SECOND EDITION, Corrected; with Additional References to
the former and later REPORTS,

By *GEORGE WILSON*, Serjeant at Law.

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R E P O R T

OF

C A S E S

IN THE COURT OF

K I N G S B E N C H

AND

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T H E

Principal Officers of the Law,

Pasch. 6 Will. & Mar. 1694.

SIR John Somers knight, lord keeper of the great seal of England, so created about Easter term 1693, being then attorney general.

Sir John Trevor knight, master of the rolls, created so when Sir John Somers was made lord keeper.

Sir John Holt knight, chief justice.

Sir William Gregory knight,

Sir Giles Eyre knight,

Sir Samuel Eyre knight, made a justice of the King's Bench this vacation in Sir William Dolben's room, who died last term. } justices of the King's Bench.

Sir George Treby knight, chief justice.

Sir Edward Neville knight,

Sir John Powell knight,

Sir Thomas Rokeby knight,

} justices of the Common Pleas.

Charles Mountague esquire, chancellor of the Exchequer.

Sir Robert Atkins knight of the Bath, chief baron.

Sir Nicholas Lechmere knight,

Sir John Turton knight,

Sir John Powell knight,

} barons of the Exchequer.

Sir Edward Ward knight, attorney general.

Sir Thomas Trevor knight, solicitor general,

Sir

The principal Officers of the Law.

*Sir Ambrose Phillips knight,
Sir William Wogan knight,
Sir Nathaniel Bond knight,
Sir John Trenchard, knight,
Sir George Hutchins knight,
Sir Henry Gould knight,*

King's serjeants.

*Sir William Williams knight and
bart.*

*Sir William Whitlock knight,
Sir Nathaniel Powell knight and
bart.*

King's counsel.

*John Conyers esquire,
William Cowper esquire,
Aglionby esquire,
Edward Clerk esquire,
William Farrar esquire,*

Term.

Term. Pasch.

6 Will. & Mar. B. R.

Sir John Holt Kt. Chief Justice.

Sir William Gregory Kt.

Sir Giles Eyre Kt.

Sir Samuel Eyre Kt.

Justices.

Rex & Regina *vers.* Tucker.

Intr. Hil. 4 & 5 Will. & Mar. Rot. 22. B. R.

S. C. Cases in
Parl. 186.

3 Lev. 396.

4 Mod. 162.

Salk. 630.

633.

Skin 338, &c.

Carth. 317.

Foster 186.

12 Mod. 95.

3 Inst. 11.

Hob. 271.

Co. Lit. 129.

Dyer 155.

Error in B. R.

to reverse an

attainder in

high treason

before justices

of gaol deli-

very.

Allegiance

what?

Who is indi-

cable of trea-

son.

H. P. C. 10.

Reginald Tucker brought a writ of error to reverse his attainder of high treason before the Justices of gaol-delivery in Somersetshire in 2 Jac. 2. for having been in the rebellion of the duke of Monmouth. The counsel for Tucker assigned several errors in the record, but all were over-ruled except two; one, That the words *contra ligeantiae suae debitum* were omitted in the Indictment; the other, That the words *secreta membra amputentur* were omitted in the Judgment. This case was often argued by counsel, as well for the King as for Tucker; and this Term the Judges gave their opinions *seriatim*, that the attainder ought to be reversed. And the reason of their resolution (wherein they are all agreed) was, for that allegiance is the mutual bond between the King and his subjects, by which the subjects owe duty to the King, and the King protection to his subjects; and treason is the breach and violation of that duty of allegiance which the subject owes to the King. If there is no allegiance, there can be no treason. Where the King does not owe protection to the criminal, nor the criminal allegiance to the King, the criminal cannot be a traitor. For this reason an alien enemy cannot be indicted of treason, but shall be tried and executed by martial law. 15 Hen. 7. Perkin Warbeck's case. 7 Rep. 6. b. Calvin's case. But an alien friend, who abides in the kingdom, owes allegiance to
B the

Post.
Indictments
by implica-
tion ill.
See 2 Hawk.
P. C. 224. to
256. what
Certainty ne-
cessary in In-
dictments.

the King, and therefore he may commit treason; and if he does, his indictment shall be *contra ligeantiae suae debitum*. The case of *Stephono Ferrara de Gama* and *Emanuel Lewis Tinoco*, 7 Rep. 6. a. *Calvin's* case. *A fortiori* in the case of a man naturally born a subject to the King the indictment for treason ought to conclude so. As to what was said by *Levinz* and *Gould* serjeants, that the omission of these words was supplied by the words *ligeantiam suam minime ponderans*, and by the other words which follow after, *contra dominum regem verum naturalem et supremum dominum suum*, which words (as they said) necessarily imply, that *Tucker* was a liege subject to the King, and consequently that this treason was committed by him *contra ligeantiae suae debitum*: the court gave this answer; that indictments cannot be made good by implication. *St. Pl. Cor.* 96. a. As to the omission of the words *secreta membra amputentur* in the judgment, Justice *Samuel Eyre* gave his opinion, that the attainder ought not to be reversed for this reason, because there is a multitude of books, which warrant that omission. But Justice *Giles Eyre* seemed to think, that these words ought to be inserted in the books, because the constant practice now warrants it; but by reason of the multitude of Precedents in the books, doubted as to the point. *Holt* Chief Justice would not give any opinion upon this point. But for the other reasons the attainder was reversed. And upon error brought in Parliament this judgment of reversal in *B. R.* was affirmed Jan. 22. 1694-5.

Comb. 369.
Carth. 348.
4 Mod 395.
Show. Par.
Cases 127.
2 Salk. 632.

Note; *Holt* Ch. J. declared, *Mich.* 7 *Will.* in argument on the case of the King and *Walcot*, that in this case of the King and Queen and *Tucker* no notice was taken of the omission of the words *secreta membra amputentur*, neither in the King's Bench nor in Parliament; but that the Judgment was reversed only for the omission of the words *contra ligeantiae suae debitum* in the King's Bench, and for the same reason the Judgment was affirmed in Parliament.

Oliver *vers.* Thomas.

Intr. Pasch. 5 Will. & Mar. C. B. Rot. 653.

S.C. Lev. 367.

A *Sumpsit* for fees due to the plaintiff as an attorney. The defendant pleaded the statute of limitations. On a demurrer by plaintiff adjudged a good plea.

Goodright

Goodright *vers.* Cornish.

Intr. Trin. 5 Will. & Mar. B. R. Rot. 20.

Ejectment. Special verdict that *John Knolls* seised of the Lands S. C. 4 Mod. in which, &c. had issue *John* and *Richard* his sons, and devised the lands to *John* for fifty years if he so long lived, remainder ^{255.} Salk. 226. to the heirs male of the body of *John*, and for default of such ^{Skin. 408.} issue remainder to *Richard* in tail male, remainder to the right ^{3 Danv. Ab. 237. pl. 4.} heirs of the devisor: the devisor died. *John* the son suffered a ^{Contingent remainder.} common recovery to the use of himself for life, and after to the ^{2 Wms. 57.} defendant in fee: the plaintiff claimed under *Richard*, viz. lessee of the eldest son of *Richard*. And it was adjudged, 1. That this limitation to the heirs male of *John* was not any executory devise, but a plain contingent remainder. 2. That it was ill, because there was no freehold to support it, and therefore that the remainder over to *Richard* well took effect. And Judgment was given for the Plaintiff. 2 Leon. 70. *Challoner vers. Bowyer*.

Orby *vers.* Hales.

Intr. Trin. 4 Will. & Mar. C. B. Rot. 763.

IT was adjudged in this case Mich. 5 Will. & Mar. that if the S. C. 4 Mod. Justices at the quarter sessions make an order by virtue of 2 W. ^{353.} & M. c. 15. for the discharge of poor prisoners, which order is not warranted by the statute (as if the prisoner was in execution for more than 100*l.*) and the sheriff discharge the prisoner accordingly, he shall not be liable to an escape. *Ex relatione m^ri Place*.

Qu. Because in that case the Justices had no jurisdiction, and the sheriff is bound to take notice at his peril for what sum his prisoner was charged in execution?

Richards *vers.* Newton.

Intr. Pasch. 6 Will. & Mar. B. R. Rot. 97.

IN *scire facias* against an executor upon a judgment against the testator, he pleaded *plene administravit* generally. The plaintiff demurs specially, because the defendant hath not shewn how he ^{S. C. 4 Mod. 296.} ^{Comb. 298.} ^{S. C.} ^{Salk. 296.} ^{Skin. 565.} ^{Plene administravit an ill plea in scire facias upon a judgment.}

he hath administered. And it was adjudged not to be a good plea.
Mich. 6 Will. & Mar. Ex relatione m'ri Place.

Qy. How it would have been upon a general demurrer, or if
 issue had been joined thereon?

Hanson vers. Hellwell.

Intr. Trin. 4 Will. & Mar. C. B. Rot. 1470.

IN trespass the writ was, *Quare bona et catalla sua cepit*; and
 the count was of a cow. Not guilty pleaded, and a verdict for
 the plaintiff. Judgment was arrested *Mich. 5 W. & Mar.* See
Hob. 37. F. N. B. 68. 20 Hen. 6. 42. 7 Ed. 4. 31. Keilw.
35. 211. b. Ex relatione m'ri Place.

Mason vers. Cutterson.

Intr. Hil. 5 Will. & Mar. C. B. Rot. 1700.

Officer cannot
 detain for fees.

IN trespass and false imprisonment the defendant justified under
 an arrest by virtue of a warrant, &c. and that he detained the
 plaintiff until he paid him 1s. and 4d. for fees. And judgment
 this term was given for the plaintiff, because the defendant could
 not detain for his fees. *Ex relatione m'ri Place.*

Ball vers. Rowe. C. B.

Court will
 take notice of
 the end of a
 Trinity term.
 Vol. 2. 1557,
 1558.

IN debt for rent. The defendant pleaded an eviction by *elegit*,
teste 15 July. And adjudged *Mich. 5 Will. & Mar.* that the
elegit was void, for the court will take notice that it was *tested* out
 of Term. *Ex relatione m'ri Place.*

Nash vers. Hemmings.

Pasch. 6 Will. & Mar.

INdebitatus *assumpsit* for so much money *pro uno dolio vini py-*
racei, Anglice perry. Upon a demurrer adjudged for the plain-
 tiff. *Ex relatione m'ri Place.*

Term.

Term. Trin.

6 Will. & Mar. B. R. 1694.

Sir John Holt Chief Justice.

Sir William Gregory

Sir Giles Eyre

Sir Samuel Eyre

Justices.

Philips vers. Berry.

Intr. Hil. 2 Will. & Mar. Rot. 148.

THE plaintiff brings an ejectment against the defendant for s. C. Cases in the rectory house of *Exeter college in Oxford*, and declares upon a demise to him by *John Painter, &c.* Upon the general issue pleaded the jury find a special verdict.

They find, that *Exeter college in Oxford* (to the rectors and scholars of which the rectory house in which, &c. appertains) was founded by *Walter Stapleton* bishop of *Exeter*, for a rector and a certain number of fellows: That the rector and fellows are a body politick, &c. incorporated by letters patent of queen *Elizabeth* by the name of *Rector and fellows of Exeter college in Oxford, &c.* They find divers statutes of the college. 1. They find one which appoints the bishop of *Exeter* and his successors to be visitors; but that he ought not to visit *ex officio*, but once in five years (unless he be requested by the rector and four of the seven senior fellows) and that this visitation ought not to continue longer than three days: They find also another statute, which enables the visitor to deprive the rector, if he obtain the concurrent assent of the seven senior fellows, in case the rector misbehave himself: They find another statute which enables the rector to deprive any of the fellows, for incontinency, &c. The jury find further, that the defendant *Dr. Bury* was rector of this *Exeter college* A. D. 1689. 1 Will. & Mar. That he upon the 16th of *October* in that year deprived *Mr. John Colmer,*

Parl. 35.
4 Mod. 106.
Skin. 447.
1 Salk. 403.
Carthew 180.
The case of
Exeter college
in Oxford.

*9 s. l. but
on a point
after seven
days.*

Colmer, one of the fellows, for incontinency: That *John Colmer* entred his appeal with the bishop of *Exeter* visitor of the college, who after having heard his appeal sent his chancellor in *March* 1690 with him to the college, to restore him: That the rector and the seven senior fellows denied to give him admittance: They find, that the bishop of *Exeter* issued his citation, for appointing a visitation the 16th of *June* following, which citation was served upon the defendant, then rector, by *Webber*: That the bishop upon the 16th came to the college, where he found the gates of the college shut against him, so that he could not obtain admission: That the bishop then and there administered an oath to *Webber* concerning the service of the citation. They find, that upon the 20th of *July* in the same year the bishop issued another citation for appointing a visitation to be held the 24th following: They find, that upon the 24th the bishop held a visitation: That upon the 25th he suspended five of the seven senior fellows for contumacy: That upon the 26th, with the consent of the then seven senior fellows, he deprived the defendant then rector for contumacy: The jury find that Mr. *John Painter* was made, &c. rector, and entred in the premisses, and demised to the plaintiff for Years, who entred: That the defendant entred upon him, and that the plaintiff brought this ejectment. *Et si super totam materiam, &c.*

After several arguments at the bar in this case the court of King's Bench was divided in opinion, viz. the three puisne judges, *Gregory* and *Giles Eyre* and *Samuel Eyre* justices were of opinion that judgment ought to be given for the defendant. *Holt* Chief Justice *contra* held, that it ought to be given for the plaintiff.

The three judges, who argued for the defendant, made two points in this case. 1. If the King's Bench had any jurisdiction to examine into the proceedings of the visitor of the college, and to give relief to the party oppressed by them. 2. Admitting that the King's Bench had a jurisdiction to examine the proceedings of the visitor; if his proceedings in this case were warrantable by the statutes of the college, or any law.

*B. R. corrects
misdemeanors
extrajudicial.*

1. As to the first point, they resolved, that to the King's Bench belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extrajudicial tending to the oppression of the subject, for which they relied on 11 Co. 98. *Bagge's* case.

College a lay
corporation.

2. They held that a college was a temporal or lay corporation, of the same nature with an hospital. And they took the difference in *Bagge's* case 99. b. that if a lay man be patron of an hospital,

hospital, he may visit it, and depose or deprive, upon good cause, the master; but if he deprive him without just cause, and by colour thereof the master be ousted, he shall have an assise, because the common law will not permit any person grieved to be without remedy. And though the founder had an absolute power over his foundation, yet he could not exclude the jurisdiction of the common law; no more than if a man should devise lands between *A.* and *B.* and his intent was, that if any difference should arise between them about the lands, it should be determined by *J. N.* without process; this appointment would be vain, and the party grieved might have his remedy by the law. Besides that the law will not allow any custom, which in any manner may tend to the support of arbitrary power, *Litt. sect. 212. Co. Litt. 141.* and for this reason will not permit the visitor to be without controul. And for these reasons they were of opinion, that they had here jurisdiction (the whole matter being found specially) to examine and correct the erroneous proceedings (if they were such) of the visitor. But they agreed, that if the ordinary deprive a master, who is ecclesiastical, without just cause, he shall not have an assise, because he hath other remedy by appeal. *8 Aff. 29. 31. 13 Rep. 70. Dy. 209. Coveney's case, Dyer 273.*

If a lay person upon visitation deprive the master wrongfully, an assise lies, contra of the ordinary.

A man cannot exclude the common law.

As to the second point, if the proceedings of the visitor were warranted in this case by the statutes of the college, or any law.

1. First they resolved, that the common law takes no notice of visitors; but that they were introduced by the canon law, which law obliges not the subjects of this realm, unless it be incorporated into the common law by act of parliament, or received time out of mind, &c. and then it is become part of the common law. But the canon law concerning visitors hath not been incorporated into the common law by any of these means, and consequently is not binding to the subject. But the means, by which the proceedings of the visitor ought to be tried and examined, are the statutes of the college; and therefore it is now to be seen, if he hath pursued the authority that they have given him: for they were of opinion that he had but a bare authority, and consequently any act greater or less than was warranted by this authority, was void.

The common law does not take notice of visitors.

Visitation was introduced by the canon law. *Gilb. Eq. Caf. 179.*

Canons bind not, &c.

Authority ought to be pursued.

2. They resolved, that the visitor had not here pursued the statutes of the college for two reasons. 1. Because they held, that the administering of the oath to *Webber* was a visitatorial act the 16th of June, and for this reason, accounting that day one of the three days of visitation, he had not any authority to visit upon the 26th of July, upon which day he deprived the defendant, because the statutes provide expressly, that he shall not hold a visitation but once

What a visitatorial act?

Fellows suspended continue fellows.

once in five years, unless he be requested by the rector and four of the seven senior fellows (which was not as the jury hath found in this case) and that the visitation shall not continue more than three days; but the 26th of July (supposing the 16th of June to be one of the days of visitation) was the fourth, and consequently all acts done upon it void. 2. The statutes appoint that the visitor ought to have the concurrence of the seven senior fellows to the deprivation of the rector; but they were of opinion, that the suspended fellows continued fellows, notwithstanding the suspension, and for that reason the visitor in this case had not the concurrence of the seven senior fellows, and therefore the deprivation of the rector was void. And for these reasons judgment, by them, ought to be given for the defendant.

Two sorts of corporations.

What corporations are visitable?

8 Ed. 3. 70.
Yelv. 60.
2 Cro. 63.

Founder, without appointment of a visitor, is visitor.

Visitation by the common law.

Office of visitor.

His determination final.

T. Jones 175.

College and hospital of the same nature.

Holt Chief Justice *contra* for the plaintiff argued, that there are two sorts of corporations, the one constituted for publick government, the other for private charity. The first, being duly created, although there are no words in their creation, for enabling their members to purchase, implead, or be impleaded, yet they may do all these things, for they are all necessarily included in, and incident to, the creation. 10 Co. 30. b. 1 Ro. Abr. 513. *Tit. Corporations*. And these sorts of corporations are not subject to any founder, or visitor, or particular statutes, but to the general and common laws of the realm; and by them they have their maintenance and support. But the last sort of corporations, which is constituted for private charity, is intirely private, and wholly subject to the rules, laws, statutes, and ordinances, which the founder ordains, and to the visitor whom he appoints, and to no others. And if the founder has not appointed any visitor, then the law appoints the founder and his heirs to be visitors. For visitation (by him) was not introduced by the common law, but of necessity was created by the common law. 10 Rep. the case of *Sutton's Hospital*. Patronage and visitation both rise from the founder; and the office of the visitor by the common law is to judge according to the statutes of the college, to expel and deprive upon just occasions, and to hear appeals of course. And from him, and him only, the party grieved ought to have redress; and in him the founder hath reposed so entire confidence that he will administer justice impartially; that his determinations are final, and examinable in no other court whatsoever.

As to the objection of the other side, that if the master of an hospital be deprived by the patron without just cause, that he may have an assise, and that a college and hospital are of the same nature; he agreed, that a college and hospital were of the same nature; but as to the objection that the master may maintain an assise,

assise, he answered, that the master could not maintain an assise, ^{Master of a college is not sole seised, and therefore cannot have assise.} because he is not sole seised; and of that opinion, he said, *Hale* chief justice had been often heretofore; and for this reason he denied the opinion in *Coveney's* and *Bagge's* cases to be law, as *Hale* chief justice had done before; besides that these cases are grounded upon an error, for they rely upon the 8 *Ass.* 29, 30. for warranting that opinion, where in truth the 8 *Ass.* does not warrant any such opinion.

2. He was of opinion, that the proceedings of the bishop in this case were well warrantable by law; for (by him) the arrival of the bishop at the college the 16th of *June*, and the administering of the oath to *Webber*, were not visitatorial acts, because the gates were shut against him, so that he could not obtain admittance. ^{Visitatorial act, what?}

3. By him also, contumacy was a good cause of deprivation, which all the other justices agreed, and then (by him) although the suspended fellows continue fellows still, and although the visitor had not the concurrence of the seven senior fellows to the deprivation of the rector, according to the statutes of the college; yet the deprivation in this case was well warrantable by the law; because that (by him) the visitor by the common law had the sole power of depriving as incident to his office, which the founder, having created him visitor, could not restrain; no more than if the king creates a corporation of a mayor and aldermen, with a clause in the patent, that upon the death or amotion of any of the aldermen, the mayor and the other aldermen may within eight days after the death or amotion of the alderman elect another in his place; although no election be made within the eight days, yet they may make election at any time after; for the power of election is incident to them as being a corporation, and the affirmative power in the patent could not take away the implied power given to them by the law. *1 Roll. Abr.* 513. For which reasons he was of opinion, that the bishop in this case had not done more than the law approves. But however that be, he concluded, that this college was a private corporation, that the founder having created the bishop visitor, the justice of his proceedings was not examinable in this court, or in any other; for which reasons he was of opinion, that judgment ought to be given for the plaintiff. But the three other justices being of a contrary opinion, judgment was entred for the defendant. ^{Contumacy good cause of deprivation. Power of the visitor.}

Upon a writ of error brought in parliament (because this was by original) the judgment was reversed. And afterwards in *Hilary* term 1694. Sir *Edward Ward* attorney general and Mr. serjeant *Pemberton* moved, that this court would enter judgment for the plaintiff; for judgment ^{Judgment of B. R. reversed in parliament; what court shall enter the judgment of reversal.}

Fellows suspended continue fellows.

once in five years, unless he be requested by the rector and four of the seven senior fellows (which was not as the jury hath found in this case) and that the visitation shall not continue more than three days; but the 26th of July (supposing the 16th of June to be one of the days of visitation) was the fourth, and consequently all acts done upon it void. 2. The statutes appoint that the visitor ought to have the concurrence of the seven senior fellows to the deprivation of the rector; but they were of opinion, that the suspended fellows continued fellows, notwithstanding the suspension, and for that reason the visitor in this case had not the concurrence of the seven senior fellows, and therefore the deprivation of the rector was void. And for these reasons judgment, by them, ought to be given for the defendant.

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Holt Chief Justice *contra* for the plaintiff argued, that there are two sorts of corporations, the one constituted for publick government, the other for private charity. The first, being duly created, although there are no words in their creation, for enabling their members to purchase, implead, or be impleaded, yet they may do all these things, for they are all necessarily included in, and incident to, the creation. 10 Co. 30. b. 1 Ro. Abr. 513. *Tit. Corporations*. And these sorts of corporations are not subject to any founder, or visitor, or particular statutes, but to the general and common laws of the realm; and by them they have their maintenance and support. But the last sort of corporations, which is constituted for private charity, is intirely private, and wholly subject to the rules, laws, statutes, and ordinances, which the founder ordains, and to the visitor whom he appoints, and to no others. And if the founder has not appointed any visitor, then the law appoints the founder and his heirs to be visitors. For visitation (by him) was not introduced by the common law, but of necessity was created by the common law. 10 Rep. the case of *Sutton's Hospital*. Patronage and visitation both rise from the founder; and the office of the visitor by the common law is to judge according to the statutes of the college, to expel and deprive upon just occasions, and to hear appeals of course. And from him, and him only, the party grieved ought to have redress; and in him the founder hath reposed so entire confidence that he will administer justice impartially; that his determinations are final, and examinable in no other court whatsoever.

As to the objection of the other side, that if the master of an hospital be deprived by the patron without just cause, that he may have an assise, and that a college and hospital are of the same nature; he agreed, that a college and hospital were of the same nature; but as to the objection that the master may maintain an assise,

assise, he answered, that the master could not maintain an assise, ^{Master of a college is not sole seised, and therefore cannot have assise.} because he is not sole seised; and of that opinion, he said, *Hale* chief justice had been often heretofore; and for this reason he denied the opinion in *Coveney's* and *Bagge's* cases to be law, as *Hale* chief justice had done before; besides that these cases are grounded upon an error, for they rely upon the 8 *Aff.* 29, 30. for warranting that opinion, where in truth the 8 *Aff.* does not warrant any such opinion.

2. He was of opinion, that the proceedings of the bishop in this case were well warrantable by law; for (by him) the arrival of the bishop at the college the 16th of *June*, and the administering of the oath to *Webber*, were not visitatorial acts, because the gates were shut against him, so that he could not obtain admittance. ^{Visitatorial act, what?}

3. By him also, contumacy was a good cause of deprivation, which all the other justices agreed, and then (by him) although the suspended fellows continue fellows still, and although the visitor had not the concurrence of the seven senior fellows to the deprivation of the rector, according to the statutes of the college; yet the deprivation in this case was well warrantable by the law; because that (by him) the visitor by the common law had the sole power of depriving as incident to his office, which the founder, having created him visitor, could not restrain; no more than if the king creates a corporation of a mayor and aldermen, with a clause in the patent, that upon the death or amotion of any of the aldermen, the mayor and the other aldermen may within eight days after the death or amotion of the alderman elect another in his place; although no election be made within the eight days, yet they may make election at any time after; for the power of election is incident to them as being a corporation, and the affirmative power in the patent could not take away the implied power given to them by the law. 1 *Roll. Abr.* 513. For which reasons he was of opinion, that the bishop in this case had not done more than the law approves. But however that be, he concluded, that this college was a private corporation, that the founder having created the bishop visitor, the justice of his proceedings was not examinable in this court, or in any other; for which reasons he was of opinion, that judgment ought to be given for the plaintiff. But the three other justices being of a contrary opinion, judgment was entred for the defendant. ^{Contumacy good cause of deprivation.} ^{Power of the visitor.}

Upon a writ of error brought in parliament (because this was by original) the judgment was reversed. And afterwards in *Hilary* term 1694. Sir *Edward Ward* attorney general and Mr. serjeant *Pemberton* moved, that this court would enter judgment for the plaintiff; for judgment ^{Judgment of B. R. reversed in parliament; what court shall enter the judgment of reversal.}

judgment ought to be entred, and that ought to be, either by this court, or the house of lords; but the house of lords cannot enter judgment, because they have only the transcript of the record, therefore this court of King's Bench ought to do it, *ne deficiat justitia*. And they compared it to the case of *Faldo vers. Ridge*, *Yelv.* 74. where upon judgment *in B. R.* for the defendant in trespass error was brought in the Exchequer chamber, and the first judgment was reversed, and upon the record returned *in B. R.* the court there gave judgment, that the plaintiff should recover; otherwise they said, that the law would be defective; and a precedent was shewn in *Winchcombe's* case, 38 *Eliz.* where the same course was taken.

The record itself is removed out of *B. R.* into the house of lords by error.

When the exchequer chamber shall enter the new judgment upon reversal.

Exchequer chamber cannot award a writ of inquiry of damages.

But by *Holt* chief justice, The house of lords have in judgment of law the true record before them, and not the transcript; for the writ of error says, *recordum et processum*, and not *transcriptum*. And he took this diversity; if ejectment is brought *in B. R.* and upon special verdict judgment is given for the defendant, if upon error in the Exchequer chamber this judgment be reversed, the Exchequer chamber shall enter the new judgment for the plaintiff; but if it had been given *in B. R.* for the defendant upon demurrer, and this judgment reversed in the Exchequer chamber, the King's Bench shall enter the new judgment for the plaintiff; because the Exchequer chamber could not award a writ of inquiry of damages. He said further, if judgment be first given for the plaintiff, and this judgment be reversed upon error, the defendant is *in statu quo*, and there he has no need to enter a new judgment. But when judgment is given first for the defendant, and this is reversed upon error, a new judgment ought to be entred, to put the plaintiff in possession of that which he demands. And it was adjudged by all the court in the principal case, that the King's Bench cannot enter the new judgment for the plaintiff; because when the King's Bench had given judgment upon the original, it had wholly executed its authority, so that it could do no more. And there is no precedent that ever the King's Bench did enter a new judgment upon a reversal in parliament of a judgment given *in B. R.* And afterwards upon application to the house of lords they gave the new judgment, as *Holt* chief justice reported *in B. R. Mich. 8 Will. 1696.*

Rex & Regina vers. Knollys.

S. C. Salk.

509.

J. L. Skin. 336.

J. L. Carth. 297.

S. C. Comb.

273.

2 Salk. 451.

AN indictment was found at *Hicks's Hall* against the defendant by the name of *Charles Knollys* Esq; for the murder of captain *Lawson* (who had married the sister of the defendant) and this indictment

J. L. Mich. 55. 1695.

indictment was removed by *certiorari* into the King's Bench, where the defendant pleaded a *misnomer* in abatement, viz. that *William Knollys viscount Wallingford* by letters patent under the great seal of England (which he produceth in court) bearing date the 18th day of *August 2 Car. 1.* was created earl of *Banbury*, to have and to hold the dignity to him and the heirs male of his body lawfully begotten, &c. that *William* had issue *Nicolas*, who succeeded *William* in the dignity, from whom the dignity descended upon the defendant as son and heir to *Nicolas*; *et hoc paratus est verificare*, &c. The Attorney General replies to this plea, that the defendant upon the thirteenth of *December 4 Will. & Mar.* preferred a petition to the house of peers then in parliament assembled, that he might be tried by his peers, and that after long considerations and debates the house of peers dismissed his petition, *secundum legem parliamenti*, and disallowed his peerage, and made an order, that the defendant should be tried by the course of the common law, &c. To this replication the defendant demurred, and the Attorney General joined in demurrer. And after divers arguments at the bar by Sir *Edward Ward* Attorney General, Sir *Thomas Trevor* Solicitor General, Sir *William Williams* King's counsel, for the King and Queen, and by Serjeant *Pemberton*, Serjeant *Levinz*, and Sir *Bartholomew Shower* for the defendant, this day, viz. the 20th of *June* the court of King's Bench in solemn arguments at the bench unanimously gave their opinions for the defendant. But because the reasons of Sir *Samuel Eyre*, Sir *Giles Eyre*, and Sir *William Gregory* justices, were comprehended in the argument of my lord chief justice *Holt*, I have omitted them here, to avoid repetition, and have only collected here the following imperfect notes of his most excellent argument.

Journ. Dom. Proc.
17. Jan. 1692-3.

Not that Sir Giles Eyre dyed 31. 3. 1695. he post. 46. — Sir W. Gregory was another dead or had ceased being a judge of B. R. before Hill. Term 1696. b. 51.

He said at the beginning, that since this case was of so great importance, that in some manner all the nobility of England had some concern in it, and since this case had given occasion to many debates in the house of Lords, and since there were many persons of great quality, who had made reflections upon the judges of the King's Bench, for not having before this time brought the defendant to his trial; he hoped that the audience would give him their pardon, if he examined the questions hereafter arising a little at large.

In this case (he said) two questions would arise.

1. If the plea be good?
2. Supposing it to be so, if the replication confesses and avoids the plea?

To the plea (he said) the council for the king had taken three exceptions.

1. That it does not appear that *Banbury* is in *England*.

2. That Mr. *Knollys* ought to have averred, that he is *unus parium regni Angliæ*, for it may be that he is an earl of *Ireland*, or of *Scotland*, and then he has not any title to be tried by the lords in this realm.

3. That he ought to have concluded his plea with *prout patet per recordum*, or ought to have produced a writ to certify that he was earl of *Banbury*. *F. N. B.* 247. *b.* *Reg. orig.* 287. *1 Cro.* 205. *Lord Savil's case.* Baron or not baron being triable by record. *22 Affise* 24. *Br. Affise* 240.

In what an earldom consists?

To give answers to these objections more effectually, he thought it much to the purpose to consider, what an earldom was originally; and he said, that an earldom consisted in three things heretofore.

1. In dignity.

2. In office.

3. In divers possessions.

Dignity of an earl how created?

As to the first, before the time of *Edward 3.* there were but two titles of nobility, *viz.* earls and barons. Barons were originally created by tenure, afterwards by writ; and lastly, *Richard 2.* in the eleventh year of his reign, by letters patent under his great seal created *John Beauchamp* of *Holt* baron of *Kidderminster*, and left a precedent, which all his successors have followed down to this time. *1 Inst.* 16. *b.* But earls were always created by letters patent. The empress *Maud* created *Milo of Gloucester* earl of *Hereford* by her letters patent. *Seld. titles of honour* 536.

Cases in parliament 5.

Office of an earl may be intailed.

As to the second, an earldom consisted in office, for the defence of the King and realm. *Braët. li. 1. cap. 8.* Earls [*comites*] had not their denomination from the county, but *a comitando regem.* *9 Co.* 49. And because it is an office, it may be intailed within *Westm. 2. cap. 1.* *7 Co.* 33, 34. *Nevil's case*; and although the statute *26 Hen. 8. cap. 13.* had never been enacted, an earldom had been subject to forfeiture by the committing of high treason. *7 Co.* 34. *a.*

Forfeitable.

As

As to the third, an earldom consisted in rents, possessions, &c. Possessions, but in process of time they decreased to 20 l. per annum, and nevertheless the heir should pay 100 l. relief within *Magna Charta*; but at this day it consists only in dignity and office, which extend over all the land.

2. He considered, that the great seal in *England* is appropriated to this realm, and that which is done under it ought to bear relation to *England*, and to no other place. If the King of *England* before the conquest of *Ireland* had by letters patent conferred a title of honour, the patentee should have been an *English* peer. It is true that the King may create an *Irish* earl under the *English* great seal. *Seld. tit. of honour* 694. *Prynne's Animadversions* 316. but then there ought to be express words; for where by the prerogative a special act is done, there ought to be express words, and it shall not be taken by implication. And farther, an act of parliament shall not extend to *Ireland*, unless it be particularly named. And therefore, to intend the defendant in this case to be an *Irish* peer is foreign, and ought to be rejected.

Great seal relates to this realm.

The King may create an *Irish* peer under the great seal of *England*.

King's grant shall not be taken by implication.

Statutes extend not to *Ireland* without naming it.

3. He was of opinion, that the place from whence the patentee takes his title is not necessarily to be in *England*; nor in reality is there any necessity, that there be any place. *Albemarle* is not within *England*, and nevertheless at the time of the making of *Magna Charta* there was an earl of that title, and there have been dukes who have born that title very lately. A man was an earl, and he had no county. *Seld. tit. of honour* 696. 39 *Ed.* 3. 35. *Rot.* 6 *Edw.* 3. n. 16. in the *Tower*. He said, that he had often made inquiry, if there were any such place as *Rivers*, but he had never been able to find any such place, only that it was the name of the earls of *Devonshire* in the time of King *Stephen*. Here is then a sufficient answer to the first objection to the plea; for if in the creation of an earl the place is not necessary (as by what he had been saying it is apparent that it is not) it was not necessary nor material, to make an averment, that *Banbury* is within *England*; but the defendant being heir to *William*, who was created earl of *Banbury* under the great seal of *England*, shall be an *English* peer.

Place of title not necessary.

Cases in parliament 2.

Earl without county.

As to the second objection to the plea, that the defendant ought to have averred, that he is *unus parium regni Angliæ*, he answered, that what is apparent has no need to be averred; but that he is an earl appears by the letters patent which he hath produced, and then, that he must be of *England*, is sufficiently demonstrated by what goes before. Besides that, he does not plead this plea

That which appears, has no need to be averred.

E

here,

Misnomer
abates indict-
ment.

here, to make a right or title to the earldom of *Banbury*, but only by way of *misnomer* in abatement of the indictment, and that *misnomer* is a good plea, see 2 *Inst.* 595. If a knight be indicted by the name of esquire, the indictment shall abate.

Baron or not,
triable by re-
cord.

The third objection to the plea was, that the defendant ought to have concluded his plea with *prout patet per recordum*, baron or not baron being triable by record. 22 *Aff.* 24. *Br. Affis.* 240. 35 *Hen.* 6. 46. 6 *Co.* 53. a. *Countess of Rutland's case*, 9 *Co.* 31. d. Or, 2. He ought to have produced a writ out of Chancery, to certify the descents, and that he is earl of *Banbury*. *F. N. B.* 247. b. *Reg. orig.* 287. 1 *Cro.* 205.

Peerage how
triable.

As to the first part of this objection, he confessed, that if the peerage of the defendant had been created by writ, it had then been triable only by record, and it had been a fatal exception; but letters patent may be pleaded and shewn to the court (as in this case is done) and they cannot be questioned, but by pleading *non concessit*; and therefore in this case there cannot be any such issue as baron or not baron; moreover there being descents here, which are mere matters of fact, and triable only by the country, such conclusion had been ill; because it cannot appear by the record, if *Nicolas* was the son of *William*, or *Charles* the son of *Nicolas*. And the books of 22 *Affis.* 24. *Bro. Affis.* 280. ought to be understood of peerage created by writ, for there was no baron created by letters patent until the eleventh year of King *Richard* 2. There is also nobility gained by marriage, and this is triable by jury. 6 *Co.* 55.

Writ out of
Chancery to
certify peer-
age.

And as to the second part of this objection, that the defendant ought to have produced a writ out of Chancery, &c. he answered, that these are only cautionary writs, and writs of privilege, and were not of necessity but for expedition. And supposing that the defendant might have had one, yet it is no consequence, that the omission of it shall be a determination of his peerage. And further, in all the precedents cited on the other side, there were no letters patent pleaded (as in our case) so that it could not appear to the court, without such writ, that the party was a peer. So that he was of opinion (and all his brothers agreed with him in all these points) that the plea was very good.

The question then will be, if the replication confesses and avoids the plea? which is in effect, if the defendant is concluded from his peerage by this order of the house of lords: And he was of opinion, that he was not for four reasons.

1. Because

1. Because this order was not a judgment by parliament.
2. Admit that it was a judgment, yet of an original cause the house of lords has no jurisdiction.
3. There was no plea depending in the house of lords concerning the right of the earldom of *Banbury*.
4. There is not here any judgment to bar him of his title.

Order by the
house of peers
is not a judg-
ment by par-
liament.

As to the first, he said that the parliament consisted of the King, the lords spiritual and temporal, and the commons. The judicial power is only in the lords, but legally and virtually it is the judgment of the King as well as of the lords, and perhaps of the commons too. *Ryl. pl. parl.* 124, 145, 184, 193, 198. Writs of error to remove records out of the King's Bench into the house of lords run, *coram nobis in præsens parliamentum*; but in this supposed judgment the King is excluded. If one may give credit to an old advocate, *Fleta, cap. 17.* he says, that all matters of authority and jurisdiction are derived from the King.

Of what the
parliament
consists.

Judicial pow-
er in whom.

Error in par-
liament.

Jurisdiction is
derived from
the king.

The house of lords has a double authority, as the parliament, and the course of the house; between which we must distinguish by their stile. And their proceedings are of different effects in law; for journals are not records of parliament, and therefore we cannot take notice of them. *Hob. 110.*

The house of
peers has a
double autho-
rity.

Journals are
not records,
and B. R. can-
not take notice of them.

Judgments ought also to be given in their proper stile; and therefore if the King's Bench, which is held *coram rege*, enter judgment by the justices of the King's Bench, it is void. But in the principal case there is no mention made of the King; therefore this judgment is not given in the proper stile, as appears by what has been said before.

Judgment gi-
ven by the ju-
stices of B. R.
void.

As to the second he said, that the house of lords has no jurisdiction in an original cause, because that supreme court is the last resort. Besides, that for the most part original causes are mixed with matter of fact, and it is unworthy of so supreme a court, to try matters of fact, for which reason error of fact in B. R. must of necessity be brought before the same judges of B. R.

The peers
have not jurif-
diction of ori-
ginal causes.

Cannot try
matters in fact.
Error in fact
in B. R. lies in
B. R.

2. If the parliament took consue of original causes, the party would lose his appeal, which the common law indulgeth in all cases, for which reason the parliament is kept for the last resort; and

causes

causes come not there, until they have tried all judicatories. Within these four years judgment was given against the earl of *Macclesfield* in the exchequer, he brought error in the house of lords, and the question was, if by the 31 *Edw. 3.* the Exchequer chamber ought not to interpose. And adjudged that it ought, and the writ abated. 4 *Inst. 21.* The case of the bishop of *Norwich*, to the same purpose.

Earl of *Macclesfield's* case.
Error out of the Exchequer lies not immediately in parliament.

Dignity in-
tailable.

Patentee dis-
turbed ought
to petition the
King, &c.

Peer cannot be
created with-
out the King.

Peers have ju-
risdiction over
their own
members.

Case of lords
*Mountjoy, Bel-
lafys, and
Lovelace.*

How the king
may give pre-
cedency.

3. He was of opinion, that this dignity differed not from an original estate at common law, for it was granted under the great seal of *England*, and therefore descendible according to the course of the common law; and it was at common law an estate in fee simple, but since *Westm. 2. cap. 2.* it is an estate tail. 7 *Co. 34.* And if the patentee be disturbed of his dignity, the regular course is to petition the King, and the King indorses it, and sends it into the Chancery, or the house of peers. *St. prer. 72. 22 Edw. 3. 5. L. Quint. Edw. 8. 117.* for the lords have no power to judge of peerage unless it be given to them by the King. 11 *Co. Delaware's* case. *Jones 96.* For as no peer can be created without the King's consent, who is the fountain of honour, no more can any be degraded without his consent. And an ordinance of the house of peers cannot confer peerage. *Jones 104.*

The house of peers (he agreed) has jurisdiction over its own members, 4 *Inst. 15, 363.* and is a supreme court; but it is the law which hath invested them with such ample authority, and therefore it is no diminution to their power to say, that they ought to observe those limits which this law hath prescribed for them, which in other respects hath made them so great.

The precedents which Mr. Attorney General hath cited are not to this purpose. That of the lords *Mountjoy, Bellafys, and Lovelace 1328* was matter of privilege. The lord *Mountjoy* claimed precedency in the house of peers of the lords *Lovelace* and *Bellafys*, being created 5 *June, 3 Car. 1.* baron of this realm by letters patent, in which there was a clause to precede the two other lords, for which he petitioned the house of lords, but they would not allow it to him: For although the King might give precedency by the common law, nevertheless in this case he was bound by the 11 *Hen. 8. cap. 10.*

The cases of the lords *Pembroke, Stamford, and Mobun*, were only petitions by them for a trial by their peers. If a peer commits treason, &c. he ought to be tried by his peers, and therefore it is decent to submit his trial to them, but he does not by that submit his title to his peerage; besides that, if the peers make an order

1620.

821

order that the petitioner shall be tried by his peers, and they make an address to the King to make a high steward, the King may chuse whether he will or no, notwithstanding their order and address. 3 Inst. 31.

Although the peers address the King to make a high steward, he may refuse. See Co. L. 74.

The case of the lord *Preston* is less to the purpose, for his patent was void, being made by King *James 2.* after the revolution.

The case of *James Percy* was also a case of privilege.

So that there is no precedent to warrant the proceedings in this case. Therefore he concluded this point, that the case coming before the lords originally, all proceedings were *coram non judice*, for they have not jurisdiction of an original cause; but, as is before shewn, it might have been brought before the lords regularly, and then their determination had been final.

3. Concerning the right of the earldom of *Banbury* there was no plea depending before the house of lords; for the defendant did not petition to enjoy the earldom, but supposed himself in possession.

The right of the title was not before the lords.

4. There is not here any judgment to bar the defendant of his title to the earldom; for no court can give judgment in a cause not depending, or which comes not in a judicial method before that court; but here it is proved by what he had been saying, that the title of the earldom was not in question before the peers. If trespass be brought for a trespass done in the land belonging to a house, and it appear at the trial that the plaintiff hath no title to the house, yet the court cannot give judgment, to put the party out of possession of the house.

Judgment cannot be in a cause not depending.

2. A judgment ought to be compleat and formal. Therefore if *quo warranto* be brought for usurping royal franchises, the court give their opinion that the defendant hath no title to them; unless they proceed and say, *ut abinde excludatur*, it avails nothing. In the same manner in the case between *Level* and *Hall*, 2 Cro. 284. where in debt upon bond the defendant pleaded acquittal by verdict in another action upon the same bond, and the entry upon the verdict was, that the defendant should recover damages against the plaintiff, *et quod eat inde sine die*, and because there was no judgment *quod querens nil capiat per breve*, it was adjudged ill.

Judgment ought to be formal.

Judgment in *quo warranto* without *ut abinde excludatur*, ill.

3. Dismission is no judgment in a court of law.

Dismission is not a judgment.

F

And

And as to the objection, that the judgment was said to be given *secundum legem parliamenti*, which the defendant by his demurrer hath confessed;

Demurrer
confesses fact.

He answered, 1, That a demurrer confesses only matter of fact, and that only when it is well pleaded, but it never confesses matter in law. *Plowd. 85. 5 Co. 96.*

*Lex parlia-
menti* is the
law of the
land.

B. R. ought
to determine
that which
comes before
them.

Binion *vers.*
Evelin,
Carth. 137.
1 Show. 99.

Filing an ori-
ginal against a
parliament
man is no
breach of pri-
vilege.

B. R. will
grant *habeas
corpus* to a
man commit-
ted by parlia-
ment after
prorogation.

2. *Lex parliamenti* is to be regarded as the law of the realm; but supposing it to be a particular law, yet if a question arise determinable in the King's Bench the King's Bench ought to determine it. *Dyer 60. 14 Car. 2. C. B. Binion vers. Evelin.* The filing an original against a member of parliament was adjudged no breach of privilege. If a Man be committed by parliament, and the parliament is prorogued, the King's Bench will grant a *habeas corpus*. The common law then does not take notice of any such law of parliament to determine inheritance originally. If there is any such, it ought either to be by act of parliament, and there is no such act; or it ought to be by custom, and no more is there any such custom. But if inheritance shall be originally determinable in parliament, where the parliament, *viz.* the house of peers, hath no jurisdiction, the peers would have an uncontrollable power, *et ubi jus est vagum, res est misera.* For which reasons he was of opinion, that judgment ought to be given for the defendant. And accordingly with the concurrence of all the other judges for the same reasons the indictment abated.

Note, that this judgment was very distastful to some lords, and therefore Hilary term 1697. 9 Will. 3. the lord chief justice Holt was summoned to give his reasons of this judgment to the house of peers, and a committee was appointed to hear and report them to the house, of which the earl of Rochester was chairman. But the chief justice Holt refused to give them in so extrajudicial a manner. But he said, that if the record was removed before the peers by error, so that it came judicially before them, he would give his reasons very willingly; but if he gave them in this case, it would be of very ill consequence to all judges hereafter in all cases. At which answer some lords were so offended, that they would have committed the chief justice to the Tower. But notwithstanding, all their endeavours vanished in smoke.

Mich.

See Journ. 22. March 1693. 1. Apr.
2694. 2. Nov. 2. Dec.
4. 5. & 12. Dec.
in June year.
See further
Journ. 22. Jan. 1697.
5. & 10. Feb.

See Cases in
Parl. 121.

Mich. Term.

6 Will. & Mar. 1694

Sir John Holt *Chief Justice.*

Sir William Gregory

Sir Giles Eyre

Sir Samuel Eyre

} *Justices of B. R.*

Memorandum, At the beginning of this term Sir Robert Atkins lord chief baron of the Exchequer resigned his office of chief baron.

John Hawles Esq; of *Lincoln's Inn* was last vacation made King's counsel.

Sir Wilfred Lawson *vers.* Story.

IT is enacted by the statute 2 Will. & Mar. *ses.* 1. *cap.* 5. that upon any pound-breach or *rescous* of goods distrained for rent, the person grieved shall have a special action upon the case and recover treble damages and costs of suit against the offenders, &c. Now the question upon a motion was, whether the costs should be trebled in such action as well as the damages? And Mr. Northey for the defendant argued that they should not; because that at common law the word *damna* included as well damages as costs, and therefore if the statute had given treble damages without more saying, the costs had been treble also. But now when the parliament inserts the word costs after the word damages, it shews that it was not their intent that costs should be included in the word damages, for then it had been in vain to insert the word costs; but it was their intention to make a distinction between the costs and damages. And by the omission of the word treble when the costs are spoken of, it is apparent that it was their intent that the party should

S. C. Skin.

555.

Carth. 321.

Salk. 205.

Treble Costs

on 2 Will. &

Mar. *ses.* 1.

cap. 5. for

pound-breach,

as well as da-

mages.

2 Inst. 289.

1 Stra. 50.

2 Stra. 974.

should recover treble damages, but only single costs. *Sed non allocatur.* For *per curiam* the word treble shall be referred, as well to the word costs, as to the word damages. And therefore it was adjudged that the costs should be treble also.

Camphill *vers.* St. John.

Intr. Trin. 6 Will. & Mar. Rot. 551.

S. C. Comb.

306.

S. C. Salk.

219.

Trover *pro*
ducentis unciis
argenti, Ang-
lice plate,
good.

Pro 200 pon-
deribus medi-
camenti.

Stile 224, 264.

Discontinu-

ance.

2 Saund. 89.

2 Keb. 139.

TRever of a box *et ducentis unciis argenti, Anglice plate, &c.* The defendant demurred to the declaration, The plaintiff demurred to the demurrer of the defendant, and the defendant joined in demurrer. Exception was taken to the declaration, that it was uncertain, because it hath not specified what sort of plate, &c. so that the defendant cannot defend himself if the plaintiff should bring another action against him for the same plate, by pleading the recovery in this action. *Sed non allocatur*; for *trover pro ducentis ponderibus medicamenti* hath been adjudged good. And there is here as much certainty as there. Then Mr. Northey for the defendant took exception to the plaintiff's demurring to the demurrer of the defendant, when he ought to have joined in demurrer, so that here is a discontinuance, for which he cited *Yelv.* 137, 138. 1 *Brownl.* 103. *Alexander vers. Lamb.* Justice Giles Eyre said, that he doubted whether the case of *Alexander* and *Lamb* was law as to the point of the discontinuance; but all the court was of opinion that there was a discontinuance here in the principal case.

Wilson *vers.* Law.

S. C. 4 Mod.

287, 290.

Skin. 443.

Carth. 331.

1 Salk. 59.

Appeal.

S. C. 2 Salk.

589.

Comb. 293.

Skin. 549.

Wilson sued an appeal of murder against *John Law* for the murder of *Edward Wilson* brother to the appellant. And the appellee prayedoyer of the writ and return, and demurred to the writ, return, and count, and pleaded over, not guilty, to the felony. The appellant joined in demurrer. And upon divers arguments by serjeant *Thompson*, serjeant *Levinz*, and Mr. *Cartheto*, on the part of the appellee, several exceptions were taken, two to the return of the writ, four to the count, and one to the joinder in demurrer.

What return
of the writ
good.

The first exception to the return of the writ was, that the writ commanded the sheriff, *quod attachies J. Law ita quod habeas corpus ejus, &c.* And the return was in these words, *viz. quod attachiare feci*, which was not (as they said) any performance of the command of the writ; for the command was personal to the sheriff,

Sheriff, that he himself should attach *Law*, and he has returned, that he hath caused him to be attached, which must be intended by some other person. And so the writ is not pursued, &c.

But to this exception it was answered by the court and adjudged, that the sheriff is not bound to execute such sort of process in person, but may do it by his bailiff. *Dyer* 241. 2 *Roll. Abr.* 457. And that which is done by the warrant of the sheriff is done by the sheriff himself, for *qui facit per alium facit per se*. And if the sheriff had returned *attachiatus est*, it had been good, as *captus est* is a good return of a *capias*. *Kitchin* 258. For if there is the substance, it matters not, if there is not the express form, as 1 *Hen. 6. 6.* *Scire facias* was returned *scire feci A.* without saying *infra nominat. A.* but because it was returned *virtute breve prædicti prout mihi præcipitur*, it was adjudged good.

Sheriff is not bound to execute attach-ment in person.

Captus est is a good return of a *Capias*.

Return of the substance is sufficient.

The second exception to the return of the writ was, that the sheriff hath returned, *ita quod corpus paratam habeo ubicunque*. This word *ubicunque* (said they) has vitiated the return, for it is altogether uncertain, nonsense, and impossible.

But to this the court answered, that the *ubicunque* was only surplusage, and that the return was good enough without it. That surplusage will not vitiate an indictment or writ, much less a return of a writ, which requires not so much certainty, and which may be sometimes supplied by intendment. 3 *Cro.* 893. 2 *Roll. Abr.* 460. 5 *Co.* 121. *b.* *Long's case*. But justice *Giles Eyre* was of opinion, that if the return had been ill, the appearance of the appellee would not have aided it; for appearance aids when the party comes in and pleads to issue, but when the party comes and demurs upon the process, this appearance will not aid any defects in the process. 1 *Roll. Abr.* 780. 1 *Bulstr.* 142. 2 *Cro.* 284. *Bradley vers. Banks*, *Yelv.* 204. But as to this the other judges gave no opinion.

Surplusage does not vitiate indictment, or writ, or return of writ.

When appearance shall aid an ill return.

The first exception to the count was to the time, for the fact was laid to be *circa horam primam post meridiem ejusdem diei*; it was objected, that this *circa* was uncertain, but it ought to have been laid precisely, as *ad horam primam*, &c. But it was adjudged, that this was certain enough, for the law does not bind to a minute.

What a sufficient certainty in the count.

Another exception was taken to the count, that the place of the wound was not certainly expressed, it being laid to be *super superiorem partem ventris juxta pectus in medio corporis*, &c. But this exception was over-ruled, for it cannot be more certain.

G

Another

Another exception to the count was, that it is not averred positively, that the appellee gave the mortal wound, for it is said, *quod percussit, pupugit, et inforavit, dans mortale vulnus*; so that having expressed it by (*dans*) it is but by way of recital; but it ought to have been *dedit*, and that had been a positive averment. *Sed non allocator*, for all the precedents are thus, and if it had been *dedit mortale vulnus* (*per Holt*) it had been less certain.

The vill ought to be mentioned in appeal, where the murder was.

The fourth exception to the count was, that it is said, that *John Law* murdered *Wilson* at *D.* in the parish of *St. Giles*, and so there is no vill shewn where the fact was committed, which is ill, for the statute of *Gloucester* provides that the vill shall be shewn.

But a parish shall be intended a vill.

But adjudged, that the count is good enough notwithstanding that, for a parish shall be intended *prima facie* a vill, 1 *Inst.* 134. b. and if it comprehends more vills than one, the other party must shew it. And therefore in this case the parish of *St. Giles* shall be intended a vill, and so it is good.

The last exception was, that the appellant, by joining in demurrer *quoad breve*, &c. and then *quoad placitum*, &c. hath divided that which the defendant hath united, and so discontinued the whole.

Demurrer is a plea.

But it was answered, that a demurrer is properly called a plea. *Co. Intr.* 80. And he could not make a joint reply to both. For which reasons the defendant was ordered to answer over, and a day was given for his trial; but he escaped out of prison, and fled into *Scotland* his own country, and so evaded justice.

Wilson vers. Bird.

THE ship was libelled against in the admiralty, for that the master being taken by a *French* privateer had ransomed the ship for 300 l. and had sued for the payment of it, and was carried prisoner to *Dunkirk*, and the money was not paid, &c. And sentence was given in the admiralty against the ship; and upon motion for a prohibition it was denied by *Holt* chief justice then alone in court; because the taking and pledge being upon the high sea, the ship by the law of the admiralty shall answer for the redemption of the master by his own contract. *Ex relatione m'ri Place.*

Rex

Rex & Regina *vers.* episcop. London & doctor. Birch.

Intr. Hil. 3 Will. & Mar. in B. R. Rot. 695.

THE King and Queen by their attorney general brought a *quare impedit* against the defendants, for hindring them to present a rector to the parochial church of St. James; and declared, that the parish of St. Martin in the fields being a very great parish, a private act of parliament was made 1 Jac. 2. by which the parish of St. James was taken out of the parish of St. Martin, and made a parish independant of that; and that the act constituted a rectory with cure of souls, and created Dr. Tenison vicar of St. Martin's the first rector, and perpetualized the succession, and gave the patronage after his death to the bishop of London and his successors, and to the lord Jermyn and his heirs, viz. to the bishop of London to present one time, and then to the lord Jermyn to present one time, and then to the bishop of London and his successors to present two times, and to the lord Jermyn and his heirs one time, *et sic vicissim*, &c. By virtue of which act Dr. Tenison was the first rector, and being so, was the third year of the King and Queen promoted to the bishoprick of Lincoln, upon the promotion of whom it pertained to the King and Queen to present a rector to the church of St. James by their prerogative, &c. and that the defendants hindred them, &c. To this declaration the bishop of London demurred. Dr. Birch in his plea confessed the act of parliament, and that Dr. Tenison was rector, and that he was afterwards elected bishop of Lincoln; and he farther pleaded the statute 25 Hen. 8. of dispensations, and that by virtue of that act Dr. John Tillotson the archbishop of Canterbury dispensed with him to hold *in commendam* for six months, and that the King confirmed the dispensation; that Dr. Tenison held this rectory *in commendam* from the 22d of October 1691 till the first of July following; and that then he was consecrated bishop of Lincoln, by which the rectory become void; and the bishop of London as patron collated the defendant; and concluded with an averment, &c. The attorney general demurred. And the case was argued at the bar by Sir Edward Ward the King's attorney, and Sir Henry Gould King's serjeant for the King and Queen, and Sir Bartholomew Shower and Mr. Finch for the defendants. And this day the 19th of November the court of King's Bench unanimously gave their judgment for the King and Queen in solemn arguments.

The questions that were made in this case were three.

1. If

1. If the crown ought by prerogative to present an incumbent to a church become void by the promotion by the King of the former incumbent to a bishoprick.

2. Admitting that the King had such prerogative, than whether he hath not barred himself by confirmation of the *commendam*.

3. Supposing that the King was not barred by his own confirmation, yet if he was not barred by the act of parliament.

As to the first question, the counsel for the defendant objected, that this prerogative had no reason to support it, but that it was a prerogative, only because it was a prerogative.

The incumbent made bishop, the church vacates by the canon law, but the King shall present by his prerogative.

Incompatibility is not the cause of this avoidance.

Bishop incumbent of the whole diocese.

But to this the court answered, that the King, by the exercise of his prerogative in making the incumbent a bishop, makes the church void, upon which, as an immediate consequent, the presentation is devolved to the King. Nor is there any considerable prejudice (if there is any at all) to the patron, for it is only the exchange of one life for another. And Sir *Giles Eyre* justice said, that it was agreed by all, that when the incumbent was made bishop, the church became void; what then shall there be, if it was by the common, or by the ecclesiastical law? And he was of opinion, that it was by the last; and as that law made the promotion of the incumbent to a bishoprick to be an avoidance of the church, so it gave to the King this prerogative of presentation. He was also of opinion, that the avoidance by promotion was not occasioned by any incompatibility (as Sir *Samuel Eyre* justice was of opinion in his argument) for there was not any such thing; for the bishop originally was incumbent to the whole diocese, and deputed persons to discharge the cure, whom he paid as he judged proper. 11 Hen. 4. 60. b. *Davies Rep.* 81. *Vaugh.* 22. *Eades vers. Ep. Oxford.*

2. It was objected, that if the King had any such prerogative, it was very probable, that the statute *de praerogativa regis*, or the old books, would have made mention of it; but both the one and the others are silent as to any such matter.

As to the statute *de praerogativa regis* the court answered, that neither does this statute make any mention of the title of the King to present by lapse, and yet this prerogative is not nor ever was disputed. And *Holt*. ch. just. said, that if a man hold lands of the King *in capite*, and die, his son being within age, the King by his prerogative shall have the lands held of all the other lords in ward, which is

is mentioned in the act, and yet it is a much more prejudicial prerogative than this of which the question is. And *Stanford praerog.* 36. says, that a prerogative, which is *de jure positivo*, is no less law, if it has not natural reason to support it; for no reason can be given, why a collateral warranty shall bind, yet without doubt it is law.

Prerogative
without natu-
ral reason.

Then secondly, There is no wonder that the old books are silent as to this prerogative. For the pope, by degrees whilst the people were blinded with superstition, had usurped the royal authority in all matters ecclesiastical, as is manifest by the statute of provisors, which was provided as a remedy for this grievance; 25 *Ed.* 3. And although that statute was designed to prevent this usurpation of the pope, yet the bigotted clergy being very powerful, he continued it; for he collated to the church, when the incumbent was made a bishop. 41 *Edw.* 3. 5. *Owen* 144. Then the statute 7 *Hen.* 4. cap. 8. was made, to hinder provisions from *Rome*. And yet 8 *Hen.* 4. *Cotton's records* 458. a. 92. *Thomas Langley* clerk was elected bishop of *Durham* by provision from *Rome*. And this usurped power was continued here until the statute of supremacy, which restored the crown to it's ancient right. And always since that act, upon the promotion of the incumbent to a bishoprick, the King has filled up the vacancy. For authority of which the court relied upon *Moor* 399. pl. 522. *Wright's* case, where the prerogative was allowed upon sight of many precedents. Same case 3 *Cro.* 526. *Owen* 144. pl. 243. and in the case of *Woodley vers. Manwaring*, 2 *Cro.* 691. *Hutton* justice was of opinion that the King had not any such prerogative, but *Winch* justice cited many precedents from the time of *Henry* 8. to the contrary. *Bro. Ab. tit. Presentment ad esglise* 61. is an express authority, where it is said, that the bishop of *Ely* told him, that he had seen a presentation of the time of *Ed.* 3. where the King *ratione praerogativae* presented to a church upon making of the incumbent bishop. And *Holt* chief justice said, that this presentation is a peculiar emanation of the power which the King hath of making bishops; and therefore when the pope made the bishop, the King could not present, because the creation of the bishop was not within the exercise of his prerogative.

Pope usurped
upon the
Kings here.

And as to *Dier* 228. which was objected against this prerogative, the court answered, that it was but a sudden opinion, besides that, the plaintiff did not demur upon the prerogative of the Queen, but took issue, that the church was void by resignation before the creation.

Interest of the King shall be preferred before his prerogative.

In the same manner as to the books of 11 *Hen.* 4. 37. 41 *Edw.* 3. 5. 4. *Inst.* 356. 17 *Ed.* 3. 40. 44 *Edw.* 3. 25. which were cited by the defendants counsel, to prove that the King presented to the church after he had made the incumbent bishop, not by any prerogative, but because that he had the temporalities of the bishoprick in his hands where the church was, or otherwise upon the account of wardship, &c. the court answered, that the prerogative consists in the presentation in the turn of another patron, and not in ousting the King himself. For when the King hath interest in the presentation, and the prerogative happens at the same time, the interest shall be preferred. As if the King be seised in fee of an advowson, and he creates the incumbent bishop, he shall present as patron, that being a title precedent to that of the prerogative.

Duke of Bedford's case. St. 12 Car. 2. cap. 37.

And as to 5 *Ed.* 2. *Maynard* 140. which was objected, &c. the court answered, that admitting the book was an express authority against the prerogative, nevertheless it is but one instance, to controul the continual current of usage to the contrary. As lately *Covent-garden* was made a rectory in the time of King *Charles* 2. and the patronage was given by the parliament to the duke of *Bedford* and his heirs. Yet upon promotion of Dr. *Patrick* to the bishoprick of *Chichester*, this King presented Dr. *Freeman*, and it was never disputed. But the case of *Edw.* 2. is not to the purpose; for at that time many bishops were collated from *Rome*, as one may see in *Walsingham* 1319, 20. for which reasons the court were clear in opinion, that the King had such prerogative, as they had held the term before in the case between the King and Queen, and the bishop of *London* and Dr. *Lancaster*, upon the same title. 1 *Show.* 441.

A dispensation saves avoidance.

The second question was, if the King had barred himself, or served his turn, by the confirmation of the *commendam*. And the court were of opinion, that he had not, for the design of the dispensation was only to save the avoidance, which otherwise would have incurred. *Jones* 161. And the King by his confirmation only continued the possession, but did not transfer his right. But by *Giles Eyre* justice, If the King grants confirmation of a dispensation for life, this amounts to a dispensation. The same law of a dispensation for six days, if the parson dies before the expiration of the dispensation.

The third question was, if the act did not bar the King. And the court were of opinion, that the design of the act was only to establish an agreement between my lord *Jermyn*, and the bishop of *London*, and the vicar of St. *Martin's*, but never intended to meddle with the prerogative.

The

The defendants counsel objected, that Dr. Tenison was not presented, instituted, and inducted; and therefore it was donative in him, and that the patronage did not vest but *in futuro*, viz. after his death, &c. that the promotion of the incumbent of a donative to a bishoprick will not make a cession; that the ordinary cannot visit, &c. To which it was answered, that the right of patronage vested immediately upon the passing of the act, at present (when the church should become void) in point of estate tho' not in point of interest. See 3 Cro. 323. *Milbourn vers. Dashburn.* 10 Co. 107.

2. If it was a rectory (it was objected) yet it shall be a new rectory, and therefore the prerogative cannot attach it. But it was answered by the court, that there will be no difference between the one and the other. For when the act (though it is a new act) makes it a rectory, it shall have all the incidents to and properties of a rectory. And as a wife shall be endowed of a new estate, 8 Co. *The Prince's case*, in the same manner a new rectory shall be subject to the prerogative. For which reasons all the judges being of the same opinion gave judgment for the King and Queen, which judgment was afterwards affirmed in the house of lords, upon error brought by the defendants.

An act makes a rectory, it shall have all the incidents of a rectory at common law.

Kirkham vers. Whaley.

IN action *qui tam* for continuing sheriff longer than a year, the defendant pleaded privilege in C. B. The plaintiff demurred. And it was argued by Shower, that the King is party to this action; for if the plaintiff entred a *retraxit*, yet the King may proceed, *quod fuit concessum per curiam*. Then where an action is sued by the King, the defendant shall not have privilege, for privilege is not good against privilege; and of that opinion the court seemed to be. *Sed adjournatur*.

1 Lutw. 193.
3 Lev. 398.
S. C. 1 Salk.
30.
2 Salk. 543.
Defendant shall not have privilege in action *tam quam*.

Lampton vers. Collingwood.

Intr. Trin. 5 Will. & Mar. Rot. 509. See Hil. 6 Will. & Mar. Rot. 309.

S. C. 4 Mod.
306.
1 Salk. 262,
Carth. 282.
If the defendant in the first action dies before *ca. fa.* sued, and afterwards the plaintiff obtains judgment against the bail in *sci. fa. audita querela* lies and not error.

Error coram vobis residet. The case was thus: Lampton was bail to J. S. in an action of debt brought against him by Collingwood, and judgment was given against J. S. Upon which Collingwood sued a *scire facias* against the plaintiff, and upon two *nihil* returned judgment was entred against him. Whereupon the plaintiff

plaintiff *Lampton* brought this writ of error, and assigned for error in fact, that *J. S.* died before any *capias ad satisfaciendum* was sued against him. Upon which the defendant took issue, and it was found for the plaintiff in error, that *J. S.* died before a *capias ad satisfaciendum* sued against him. And now the question was, if error lay. And Mr. *Northey*, to maintain the writ, cited 3 Cro. 145. *Hill vers. Tempest*, and *Rainsford vers. Mallet*. 4 Leon. pl. 76. *Hunt and Gonnell's case*, and pl. 99. 3 Cro. 730. express in the point, *Cockyn vers. Lady Hawkins*. 3 Cro. 733. *Price vers. Price*. 1 Cro. 481. *South. adf. Griffith*. But on the other side against the writ were cited 3 Cro. 597. *Hobbes vers. Todcastle*, *Gouldsb.* 174. pl. 108. *Mo.* 432. pl. 607. 1 Rol. Ab. 450. pl. 7. *Stile* 281, 288, 323. 1 *Rolls Ab.* 308. pl. 13. and 762. pl. 2. *Barcock vers. Thompson*. And it was adjudged by the whole court, that a writ of error will not lie in this case, for there is no error in the court; but it is reasonable, that the party should have an *audita querela*, because he had not notice to come in and plead this matter.

Comb. 325.

Nurse vers. Frampton.

S.C.Salk. 214.
See 3 Cro. 56.
2 Roll. A. 22.
2 Inst. 673.
Deed good if
the parties
sign.
3 Lev. 140.

NURSE brought debt against *Frampton* for a certain sum of 25*l.* due to *Nurse* by agreement by deed between the plaintiff and the defendant. Upon oyer of the deed it appeared to be thus: viz. Tis agreed that a grey nag bought of *J. S.* by Mr. *Frampton* shall run twenty five miles in two hours time for, &c. in witness whereof we have set our hands and seals, &c. omitting the names of the persons between whom this deed was made, but the plaintiff and defendant had signed the deed. And after demurrer the court was of opinion, that inasmuch as the plaintiff and defendant had signed this, although it was not mentioned in the body of the deed, by whom or to whom it was made; yet it will warrant the declaration's reciting, that it was made by the plaintiff and defendant. And judgment was given for the plaintiff.

Hilary

Hilary Term.

6 & 7 Will. & Mar. 1694. B.R.

Sir John Holt *Chief Justice.*

Sir William Gregory
Sir Giles Eyre
Sir Samuel Eyre } *Justices.*

Rex & Regina *vers.* Larwood.

INformation, brought against *Larwood* for not serving the office of sheriff in the town of *Norwich*, being duly elected, sets forth, that *Norwich* is, and time whereof, &c. hath been an antient town. And that the citizens thereof are and have been time whereof, &c. a body politick known by divers names, heretofore by the name of the bailiffs and citizens of *Norwich*, and now by the name of the mayor, citizens and commonalty. That King *Henry 4.* in the fifth year of his reign, by charter bearing date the 23d of *January* in the same year, granted to the corporation of the city of *Norwich*, that the city should be a county by itself, and that the commonalty should choose two sheriffs in lieu of the four bailiffs. That King *Charles 2.* in the 15th year of his reign by charter confirmed the charter of *Henry 4.* and granted over, that in the election of the sheriffs this form shall be observed, *viz.* that the mayor, sheriffs and aldermen, between the 24th of *June* and the first of *September* should choose *unam personam habilem* to execute the office of sheriff for the year ensuing, and that the commonalty should choose another. That the defendant *Larwood* was elected sheriff the ninth of *July* by the mayor, sheriffs and aldermen, to enter into his office the 29th of *September* next ensuing. That *Larwood* had notice of this election, but without any reasonable cause, he appeared not, nor took the oaths, nor executed the said office, to the great hindrance of the affairs of the King, &c. The defendant pleaded the statute of 13 *Car. 2. cap. 1.* for the regulation

S. C. 4 Mod.
269.
Salk. 167.
Skin. 574.
Carth. 306.
2 Ventr. 248.
Information
for not serving
the office of
sheriff.
2 Stra. 1193.

tion of corporations, and that he was a protestant dissenter from the church of *England*, and had not received the sacrament within the year preceding the election (as that act provides) whereby he was incapacitated to execute the said office, and the election was void; and that he after this election, and before the first of *August*, gave notice to the mayor, &c. of this disability, &c. The attorney general replied, that the defendant ought to have received the sacrament yearly, and that he ought not to take advantage of his own wrong or default. The defendant in his rejoinder pleads the act of 1 *Will. & Mar. cap. 18.* which gives liberty of conscience to all protestant dissenters, and shews that he took the oaths of 1 *Will. & Mar.* and had subscribed the declaration at the general quarter-sessions, &c. and brings himself within the compass of the act, &c. To which the King's attorney demurs, and the defendant joins in demurrer.

This case was argued by Sir *Bartholomew Shower* and Mr. serjeant *Wright* and Mr. serjeant *Rotherham* for the defendant, and by Sir *Thomas Powys*, Mr. serjeant *Pemberton*, and Mr. serjeant *Levinz* for the King; and afterwards by all the judges on the bench, who all concurred in opinion.

1. That the rejoinder was a perfect departure, because it did not strengthen the bar, and it ought to have been pleaded at the beginning, because he might and had opportunity to do it.

1 *Will. & Mar. cap. 18.* is a private act.

2. They all agreed, that the act of 1 *Will. & Mar.* which indulges dissenters, is a private act, and therefore the court could not take notice of it without pleading. And they were of opinion that it is a private act, because,

There was always a discipline established in the church of *England*.

1. Time out of mind, &c. there was a discipline established in the church of *England*, which all persons were obliged to observe by the canon law before the reformation, *Linwood* 8. and since the reformation by the statutes of *Edw. 6.* and 1 *Eliz.* so that the law took no notice of any such persons as dissenters before this act, and therefore it is private.

The intent of 1 *Will. & Mar.* was not to exempt dissenters from offices.

2. Because that it does not extend to all dissenters from the church, but only to those who go to the sessions, and there take the oaths, and subscribe the declaration. And Sir *Giles Eyre* justice declared, that his opinion was, that if the defendant had pleaded this act, yet it would not have aided the defendant. For the intent of the act was only to give the dissenters liberty to exercise their religion, but not to exempt them from serving their country in employments agreeable to their several capacities. Besides, he said,

said, if this were allowed, all the people of *England* would turn dissenters, to avoid the execution of troublesome offices, and so there would be no body to discharge them, by which there would be a failure of justice. But to this point the other two justices gave no opinion. But as to the judgment in the principal case, Sir *Samuel Eyre* justice, was of opinion for the defendant. Sir *Giles Eyre* justice, and my lord chief justice *Holt* for the King. Sir *William Gregory* justice, though absent, agreed with Sir *Giles Eyre* and my lord chief justice, as Sir *Gyles Eyre* said he declared to him.

Sir *Samuel Eyre* justice, for the defendant argued,

1. That it is apparent by the information, that they who elected the defendant sheriff, had no power to make any such election, for the liberties granted by the charter of *Henry 4.* could not be divested but by surrender or forfeiture, and neither the one nor the other appears by the record; nor is it apparent that the corporation accepted the charter of *Charles 2.* But *Charles 2.* could not alter the liberties once settled by the charter of *Henry 4.* An affirmative statute will not take away nor change a power precedent. *Hob. 173. Stukely vers. Butler. 1 Inst. 111. 11 Co. 64. Dier 391.* much less can the subsequent grant of the King do it. And then the mayor, sheriffs, and aldermen, had not any power to elect a sheriff; and by consequence the defendant is unlawfully elected, and so the election was void.

Liberties granted by charter cannot be divested, but by surrender or forfeiture.

2. Admit that the mayor, &c. had power to elect a sheriff, yet he was of opinion, that the plea was good. For, he said,

1. That the design of 13 *Car. 2. cap. 1.* was to exclude men, who were not of the church of *England*, out of all offices, which concern the government; and therefore the defendant being a dissenter was altogether disabled.

2. By law no man ought to be punished twice for the same offense; but if the court here shall punish the defendant, this rule will be infringed. For the statute punishes the defendant once, by disabling him to exercise the office; for the office of sheriff (said he) was a profitable office, and by the common law officers were honourable places and not burthens: And therefore an ambitious man, who will prefer honour before profit (admitting that these offices are not profitable) will esteem such a disability a great punishment.

*Nemo bis puni-
tur pro uno de-
licto.*

3. It is unreasonable to punish a man for not doing that, which the law disables him from doing. But if he had taken upon him the office here, he had been punishable, because he was incapacitated by the act.

To conclude, he cited a case between the mayor of *Guilford, &c.* and *Clark*, 2 Will. & Mar. in C. B. which see now reported in 2 Vent. 247. where in debt upon a by-law for not having served an office being duly elected, the defendant pleaded this act of 13 Car. 2. cap. 1. and it was held a good plea; which in effect was the same with this principal case. And therefore he was of opinion, that judgment ought to be given for the defendant.

My lord chief justice *Holt*, and Sir *Giles Eyre* justice, argued for the King.

1. That the election was good.

2. That the plea was ill.

As to the first, they agreed, that it was not in the power of the King to take away liberties before granted by him, &c. But if a corporation accept such a charter, it is good. And here is evidence of their acceptance, for the commonalty used heretofore to elect both the sheriffs, and now they elect but one of them? besides that, if the corporation had not accepted this last charter, the defendant ought to have shewn it; but now he has admitted it by his special plea. If the mayor, &c. had refused to accept the charter of *Charles* 2. the charter had been void. But when a corporation takes a new charter concerning liberties, one may make use of it as a grant, or confirmation. 2 Cro. 313. *Goodson vers. Daffield*. 21 Hen. 7. 5. a. 2 Roll. Abr. 197.

Corporation takes a new charter of liberties, it may be used as a grant or confirmation.

As to the second point, they held that the plea was ill; for (by them) the design of 13 Car. 2. cap. 1. was not to exempt any person from executing any office to which he was obliged before, but to qualify himself for the execution of it. For the act intended to discourage dissenters, and not to favour them. But if this plea shall be allowed, it will be to construe the act much to their advantage; for these offices are not profitable, but chargeable, and full of trouble.

The King interested in the subject, and may compel him to serve.

2. The King has a natural interest in every subject, and may compel him to serve him in any function, in which he shall judge him capable. *Moore* 111. *Knowles vers. Luce*. And no body can be exempt

exempt from the office of sheriff but by act of parliament, or letters patent. 4 Leon. 33. Savil. 43. Pelbam's case, 9 Co. 46. b. Earl of Salop's case. Exemption from being sheriff, how?

3. No man shall take advantage of his own disability, as no man can plead that he is a fool, or *non compos*; but if a man *non compos* be indicted, the judges *ex officio* shall acquit him, because the King takes care of all such persons. But if a man be disabled by judgment to bear an office, there he is excused, *quia judicium redditur in invitum*. But where he may remove the sentence, as excommunication, he shall take no advantage of it. See 2 Ventr. 247, 248. Sir John Read's case. And in this case the defendant not having qualified himself as he ought to have done, shall not take advantage of his own disability. For which reasons judgment was given by these judges for the King, against the opinion of Sir Samuel Eyre justice. None shall take advantage of his own disability. Non compos indicted shall be acquit. Judicium redditur in invitum.

Tipping *vers.* Cozens.

THE jury find a special verdict, that *Edward Cozens*, seised in fee of the lands in question, by indenture dated the sixteenth of October 1654, in consideration of a marriage intended to be celebrated between him and Mrs. *Grace Fry*, and of 1000 l. portion, conveyed these lands to trustees, to the use of himself and his heirs until the marriage took effect, and then to the use of Mrs. *Grace Fry* for life for her jointure, then to trustees and their heirs during the life of *Edward Cozens*, in trust to support contingent remainders, and for that purpose to make entries, &c. but to permit *Edward Cozens* to receive the rents and profits during his life, remainder to the use of the first, second, third, &c. sons of that marriage in tail male successively, remainder to the heirs male of *Edward Cozens* and his then intended wife, remainder to the heirs of their bodies, remainder to the heirs male of *Edward Cozens*, remainder to the right heirs of *Edward Cozens*; and in this indenture *Edward Cozens* covenanted to levy a fine to those uses, which fine was levied accordingly: They find farther that this marriage took effect, and that *Edward Cozens* had issue of that wife but one daughter, *Elizabeth*, who married afterwards *George Tipping*: They find farther, that *Edward Cozens* in 1686 covenanted with *John Shepherds*, &c. to levy a fine to the use of himself for life, remainder to his wife for life, with divers remainders over for life and in tail, exclusive of his daughter, remainder to his own right heirs; in pursuance of which covenant a second fine was levied with warranty against *Edward Cozens* and his heirs, with proclamations according to the statute; and at the time of the fine levied

K

Edward

Edward Cozens was in actual possession, and had no issue male: That the first of August 1686, *Elizabeth* the daughter died in the life of her father, and left an infant daughter, *Lucretia Tipping*, lessor of the plaintiff: And 1 Febr. 1690 *Edward Cozens* died, and *Grace* his wife entred, and enjoyed the lands during her life, and that *Lucretia* was an infant at the time of the death of *Edward Cozens*; and that when *Grace* the wife of *Edward Cozens* died, the defendant entred claiming under the settlement in 1686; and that the lessor of the plaintiff entred upon him, and leased to the plaintiff; that the defendant re-entred upon him, and the plaintiff brought this ejectment. *Et si, &c.*

Estate for life to B. remainder to his right heirs, the fee vests in B.

Second use shall be executed by statute.

And serjeant *Wright* for the defendant argued, that *Edward Cozens* had an estate tail in himself, and then he barred it by his fine in 1686, and by consequence the title was in the defendant. And to prove this, he said, that where the ancestor took an estate for life, and afterwards a limitation is made to his right heirs, or his heirs male, &c. the fee, be it simple or tail, vests in the ancestor, and the heir shall take only by descent. *Co. Li. 22. b. Fenwick and Mitford's case.* Then in this case *Edward Cozens* took an estate for life, for there is here an express limitation to *Edward Cozens* during his life, for the trust being limited to *Edward Cozens* to take the profits during his life, is an estate of freehold executed in himself by the statute 27 Hen. 8. cap. 10. For the feoffees take by the common law, because the use is limited to them, and the statute saith, other, and not the same, person to take the use. *Br. Tit. Feoffment al use, pl. 58. 1 Andersf. 328.* Feoffment to *A.* to the use of *B.* for life, remainder to the use of *C.* in tail, remainder to the use of *A.* in fee; the first and second uses are executed by the statute, and the third by the common law. And this will not break in upon the rule, that the statute shall not execute a use upon a use; for in this case the feoffees do not take by way of use, but by the common law. But if a man bargains and seals to *B.* to the use of *B.* and his heirs, in trust for *C.* this trust cannot be executed by the statute; because the use was raised before in *B.* and executed. And altho' the statute shall be executed in *Edward Cozens*, yet a *scintilla juris* should remain in the trustees, to serve the contingent remainders, when they should happen. *Sed non allocatur.* For by *Holt* and *Eyre* justices, (no other justices being in court) the trustees take by the statute, and then this limitation being to them in trust for *Edward Cozens* to take the profits, there cannot be an execution by the statute, for that would be to raise a use upon a use. If a feoffment be made to *A.* &c. to the use of *A.* and his heirs, in trust for *B.*; *A.* takes by the statute, because he takes a different estate by the use, from that which he hath in the land, and then

then the trust to *B.* cannot be executed. Then serjeant *Wright* argued, that by a resulting use, and operation of law, an estate of freehold shall be raised to *Edward Cozens*, for which he relied upon *Co. Li. 22. b. Fenwick and Mitford's* case. And it is no objection, to say that he has made a disposition here during his life; for the estate to the trustees is but a bare estate of freehold, forfeitable and mergeable; and therefore the law may well create to him an estate for life upon such possibility. As if land is limited to *A.* for the life of *B.* remainder to *B.* for his own life; this remainder to *B.* is good, because *A.* might forfeit, &c. 2 *Co. 51. a. Sed non allocatur*; for, *per curiam*, There cannot be here any resulting use to *Edward Cozens*, because he has made a full disposition of the intire estate, and then the law has no need to make it. But in the case of *Fenwick and Mitford* the party had not disposed of the freehold during his life, and the law cast it upon him, because whatsoever part of the use the feoffer has not aliened, will remain to himself. But in this case the design was, that the whole estate should be disposed of, so that it should not be in the power of *Edward Cozens* to destroy the contingent remainders. So that if the court will raise a resulting use here, it will be contrary, as well to the intent of the parties, as to the rules of the law. 2. It was answered and admitted by all, that the warranty had no operation, because the lessor of the plaintiff was an infant at the time of the descent. *Litt. sect. 726.* Judgment was given for the plaintiff, *nisi*, &c.

No resulting use shall arise to the party for life, where he disposes of the estate for his life.

Collateral warranty descending upon an infant does not bar.

Rex vers. Ely.

THE return of the rescue was quashed, because it was *recussit*, instead of *rescussit*. *Ex relatione m'ri Nott.*

Wate vers. Briggs, Marshall B. R.

DEBT upon escape for the escape of *J. S.* The plaintiff in his declaration shewed his recovery, and that *J. S.* was brought by *habeas corpus* before Mr. justice *Gregory*, and was by him committed in execution to the *Marshalsea*; but does not say, *prout patet per recordum* of the commitment. The defendant demurs generally. And it was urged for the plaintiff, that this omission was only matter of form, and therefore aided by the general demurrer. See 1 *Sid. 216. Middleton vers. Bail of Silvester*; for it is only inducement to the action, and not the foundation of it. And *per curiam*, when the record is the ground of the plaintiff's action, he ought to conclude, *prout patet per recordum*: But here

S. C. 2 Salk. 565.
5 Mod. 8.
Prout patet per recordum.
See now the Stat. 4 & 5 Ann. c. 16. sec. 1.
Co. L. 302. a.
2 Keb. 209, 206.
Post. 93.

Estoppel.

the escape is the foundation of this action; and although the commitment is not distinctly put in issue, yet it may be found upon the general issue; and the defendant is not estopped by this record, but he may aver, that J. S. was not in prison, notwithstanding that; and the plaintiff ought to prove him an actual prisoner. Judgment for the plaintiff. *Ex relatione m'ri Nott.* Adjudged *Mich. 6 Will. & Mar. in B. R.* See *Hob. 233. 2 Saund. 402.*

Administrator.

Debt was brought by the plaintiff *in jure suo proprio*, for the escape of a prisoner in execution upon a judgment recovered by the plaintiff as administrator. And *per curiam* the action is ill brought; for the first judgment being in right of the intestate, the action of escape ought to be in right of the intestate also. *Mr. Nott. Hill. 6 Will. 3. B. R.*

Borough's case.

DEBT will not lie against an infant for a copyhold fine upon his admission. And therefore an infant arrested upon such an action, being five years of age, was discharged. *Ex relatione m'ri Place.*

Reservation by the King of rent to his house-keeper of Whitehall not good.

THE King made a lease of a house belonging to his house-keeper of Whitehall, reserving a rent to the house-keeper for the time being, and it was held an ill reservation. For though the King may reserve rent to a stranger, yet such a reservation as this is ill, because he cannot reserve rent to such an officer who is removable at the will of the King. *Ex relatione m'ri Nott. Hill. 6 Will. 3. B. R.*

Atkins *vers.* Uton.

S. C. Comb. 318.

Covenant by a mortgagor.

Mortgager covenanted with the mortgagee, for the more absolute assurance of the lands mortgaged, to make such farther assurance, &c. Adjudged that this covenant did not oblige him to release his equity of redemption, but only to make such farther assurance of the land, &c. under the same conditions as in the mortgage. *Hill. 6 Will. 3. B. R. Ex relatione m'ri Nott.*

Easter

Easter Term

7 Will. 3. B. R.

Moore *vers.* Parker.

IN a feigned action to try an issue directed out of the house of peers, a special verdict was found, in which the case was thus. ^{S. C. 4 Mod. 316.}
A. had issue *B.* his son, and upon the marriage of *B.* settled ^{3 Danv. Ab. 182. p. 23.}
lands to the use of *B.* for life, remainder to the wife of *B.* ^{Abr. of cases in equity 182. p. 22.}
for life, remainder to the first, second, &c. sons in tail, remainder ^{Skin. 558. 16.}
to his own right heirs. And afterwards *A.* devised these lands to ^{Estate executed.}
such issues male as *B.* should have by any other wife, in tail male; and in case of failure of issue male in *B.* he devised that all his
lands should go to his grandchildren by his daughter *Parker* in fee, under whom the defendant claims as grandchild to *Parker*. *A.* dies; *B.* suffers a common recovery, and dies without any issue male; under whom the plaintiff claims. And upon this special verdict, What estate had *B.*? And after argument at the bar by Sir *Thomas Powis*, &c. By *Holt* chief justice, It is impossible to make this an estate tail in *B.*; for nothing is given to him by this devise, but he has only the estate that he had by the first settlement. In 29 *Ed.* 3. estate for life is given to *A.* remainder to the heirs of the body of *B.* *A.* assigns his estate to *B.* by which *B.* becomes tenant for the life of *A.* remainder to the heirs of his body, yet he has not an intail executed in himself, but the remainder continues in contingency. So here, there being two several conveyances, this devise cannot be tacked to the estate for life limited by a different conveyance, *quod fuit concessum* by the other justices. See *Dier* 303. pl. 58. But by *Holt* chief justice, the question is here, if this immediate devise be good to the issue not being *in esse*. Devise to an infant *en ventre sa mere* is good as a future devise, ^{Devise to a person not in esse.} but not if it be devised *in praesenti*. Then here, if this is a void devise, the second devise shall be void also; for it cannot be a contingent remainder, because there is no particular estate to support it; and as an executory devise it will be void, because it is to take ^{2 Stra. 1092.} effect ^{Executory devise.}

effect upon the death of B. without issue. *Adjournatur. Ex relatione m'ri Nott.*

Avery vers. White.

Conclusion of
the condition
omitted.

DEBT upon a bond conditioned to pay money, and upon *oyer* it appears, that the usual conclusion of a condition, *viz.* that then this obligation shall be void, &c. was omitted. And therefore Mr. *Northey* for the plaintiff argued, that the bond was single. *Sed non allocatur.* For *per curiam* the condition being to pay money is a good defeasance of the bond; and if the obligor pay the money, the obligation shall be void. But no judgment was given, because the parties agreed. Mr. *Nott.*

Melwood vers. Leech.

Trespass with-
out *contra*
pacem.

See now the
Stat. 4 & 5
Ann. c. 16.
sec. 1.

TRespass. The words *contra pacem* were omitted in the declaration, and therefore after execution of a writ of inquiry judgment was arrested upon motion. But *Holt* chief justice seemed to incline that it would have been good after verdict. Mr. *Nott.*

Gibbons vers. Pepper.

S. C. 4 Mod.
404.
Salk. 637.
1 Vent. 295.
2 Lev. 172.
3 Keb. 650.

TRespass, assault and battery. The defendant pleads, that he rode upon a horse in the King's highway, and that his horse being affrighted ran away with him, so that he could not stop the horse; that there were several persons standing in the way, among whom the plaintiff stood; and that he called to them to take care, but that notwithstanding, the plaintiff did not go out of the way but continued there; so that the defendant's horse ran over the plaintiff against the will of the defendant; *quae est eadem transgressio, &c.* The plaintiff demurred. And serjeant *Darnall* for the defendant argued, that if the defendant in his justification shews that the accident was inevitable, and that the negligence of the defendant did not cause it, judgment shall be given for him. To prove which, he cited *Hob.* 344. *Weaver vers. Ward.* Mo. 864. pl. 1192. 2 *Roll. Abr.* 548. 1 *Brownl. prec.* 188.

If the defend-
ant justifies,
and not confess
the cause of
action, it is
ill.

Northey for the plaintiff said, that in all these cases the defendant confessed a battery, which he afterwards justified; but in this case he justified a battery, which is no battery. Of which opinion was the whole court; for if I ride upon a horse, and J. S. whips the horse, so that he runs away with me, and runs over any

any other person; he who whipped the horse is guilty of the battery, and not me. But if I by spurring was the cause of such accident, then I am guilty. In the same manner, if *A.* takes the hand of *B.* and with it strikes *C.* *A.* is the trespasser and not *B.* And *per curiam* the defendant might have given this justification in evidence upon the general issue pleaded. And therefore judgment was given for the plaintiff.

Battery, by whom?

Meriton *vers.* Briggs.

Escape. The defendant pleads recaption upon fresh pursuit. The plaintiff replies, *De injuria sua propria absque hoc quod* he retook, &c. upon fresh pursuit, *et adhuc detinet*. The defendant demurs, and shews for cause, that the plaintiff had traversed matter not alledged in the plea, *viz. quod adhuc detinet*, which ought not to be; for if the defendant hath suffered *J. S.* to escape a Month after the recaption, yet the plaintiff shall be barred by the recaption for the old escape, and shall have a new action for the new escape; *quod Holt* chief justice *negavit*, for both are but one escape. Judgment for the plaintiff. Mr. Nott.

Escape.

Traverse of matter not alledged.

Rex *vers.* Crosby *alias* Philips.

Crosby was indicted of high treason, and at the trial at bar he excepted against the evidence of Mr. Aaron Smith, because he had been set in the pillory upon a judgment given against him in this court upon an information 34 Car. 2. the record of which he produced. Mr solicitor general Trevor and Mr. Cowper on behalf of Aaron Smith argued, that the infamy was always a consequence of the guilt and not of the punishment; and therefore, by them, if an innocent man hath an infamous judgment given against him, for a crime that does not deserve such judgment, this will not render the party infamous. Then for application they said, that the crime of which Mr. Aaron Smith was accused, did not deserve such judgment; and therefore shall not take away his testimony. And Sir Samuel Eyre justice seemed to be of that opinion. But Holt chief justice gave no opinion as to this point, saying that he could not impeach the record; but he was of opinion that the general act of pardon 2 Will. & Mar. gave Mr. Smith a new credit, but did not work by way of restoration, to restore him to his old credit. As if a person be attainted of felony, he is now incapable of making a purchase to hold, or to give evidence; but if the King pardons him, he is now become a new creature, and may do both; but he is not restored, to inherit to those persons, to whom he was inheritable

S. C. 5 Mod.

15. Salk. 689.

Skin. 578. *J. C.*

See Lev. 426.

1 Vent. 349.

Hob. 81.

State trials

vol. 4. 383.

2 Salk. 461.

Infamous

judgment gi-

ven against an

innocent man

does not take

away his testi-

mony.

Pardon, how

it operates.

What disability the King may pardon.

Comparison of hands no evidence in treason.

inheritable before. And the difference is, between a civil disability, which the pardon cannot cure, *Co. Li.* 234. Sir *Ar. Ingram's* case, and a criminal disability, which the pardon may take away. And for these reasons the testimony of Mr. *Aaron Smith* was admitted. But the principal point of treason charged upon Mr. *Crosby* being the writing of certain treasonable papers, which the King's counsel endeavoured to prove by comparison of hands, having no other evidence; the prisoner Mr. *Crosby* produced the copy of the act of parliament for the reversal of the attainder of *Algernoon Sidney Esq;* in which it was declared, that the comparison of hands is not legal evidence. Upon which the jury found the prisoner not guilty.

Williams *vers.* Grey.

S. C. 4 Mod. 403.

1 Salk. 12.

3 Danv. Ab.

361. pl. 3.

Executor shall have case

against a she-

riff for a false

return of a

feri facias in

the time of the

testator.

Cro. Car. 297.

1 Ro. Abr.

913. (P.) pl. 3.

1 Vent. 30.

Latch 167.

Noy 87.

Poph. 189.

Jones 173.

1 Roll 918.

pl. 3.

Williams executor of *J. S.* brought an action upon his case against *Grey* sheriff of the county of *Wilts.* And declared that his testator had recovered judgment in debt for against *Mellin*, upon which he sued a *feri facias* directed to the defendant then sheriff, to levy 147*l.* 10*s.* of the goods of *Mellin*; that the defendant by virtue of the *feri facias* took in execution goods of *Mellin* to the value of 101*l.* 10*s.* but *falso, fraudulenter, et deceptivo*, returned, that he had levied goods but to the value of 47*l.* part of which he had sold, to the value of 19*l.* 15*s.* and 4*d.* and that for the residue he had not found purchasers, &c. And for this false return the plaintiff as executor brings this action. Upon not guilty pleaded, verdict was given for the plaintiff. And now Mr. *Northey* moved in arrest of judgment, that the action did not lie; because this false return is a meer personal wrong, and of consequence died with the testator. And it is not within the statute of 4 *Ed.* 3. *cap.* 7. *de bonis asportatis.* And he cited 1 *Roll. Ab.* 912. which book says, that it was left a *quære* in the case between *Lemason* and *Dixon* (for the court was equally divided) if case lies for an executor for an escape upon *mesne* process made in the life of the testator. And if upon a *feri facias* the sheriff levies the debt, and does not return his writ, nor pay the money to the party, and the person who sues the execution dies, whether his executor may have an action against the sheriff. *Rolle* says, that in a case between *Spurstow* and *Prince*, this being moved after verdict in arrest of judgment, the plaintiff prayed judgment against himself, to the end that he might commence a new action for his own expedition. But *Holt* chief justice, and Sir *Samuel Eyre* justice (Sir *Giles Eyre* justice, and Sir *William Gregory* being absent by reason of sickness) after the case had been argued two or three times, were of opinion, that the action well lay; for the case of *Lemason*

Lemason and Dixon was upon *mesne* process, but if it had been after execution, the judges there, by the reasons which they gave, seem to incline, that the action would lie. To the same purpose is *F. N. B. 121. a.* This seems then to be stronger than when the body is taken in execution; for the body is but in nature of a pledge for the debt, but upon levying of the goods, a right was vested in the testator. And the statute *de bonis asportatis* has been always favourably extended for the benefit of executors. For which reasons they gave judgment for the plaintiff.

Reason that executor may have escape against the sheriff for escape made in the life of the testator, of a man in execution.
Mich. 5 Will. & Mar. C. B. Orby vers.

Hales 1693. Intr. Trin. 4 Will. & Mar. C. B. Rot. 769.

Waltham vers. Sparkes.

William Waltham executor of *Rachael Waltham*, executrix of *S. C. Skin.*
William Waltham, brings debt upon bond against the defendant. The defendant demands oyer of the bond, and of the condition, which was, that if the defendant, his heirs, executors, and administrators, shall save harmless, as well the overseers of the poor of *Shafford* in *Bedfordshire* and their successors, as all the inhabitants of the said parish, from all expenses, charges, &c. upon the account of *John Gorden*, his wife and children, that then, &c. The defendant pleads *non damnificat*, &c. The plaintiff replies, that *John Gorden* had issue *Joseph Gorden*, who settled at *Shafford*, and there married, and had children there born; that *Joseph Gorden* being sick became impotent and incapable of maintaining himself, so that the 19th of August 5 Will. & Mar. two justices of peace, upon complaint made to them by the overseers of the poor, made an order and warrant, that the inhabitants of the said parish should allow 2 s. for one week then passed, for the maintenance of *Joseph Gorden* his wife and children; which order and warrant were delivered to *Nicolas Seams* overseer of the poor: That the 2 s. were paid by the inhabitants; and he avers that 8 d. part of the 2 s. was for the maintenance of *Joseph Gorden*, &c. To this the defendant rejoins, and traverses, that the 8 d. were for the maintenance of *Joseph Gorden*, &c. The plaintiff demurs. Serjeant *Heath* and serjeant *Wright* for the plaintiff argue, that the traverse, which the defendant hath taken, is immaterial. For if a man will traverse, he ought to traverse that which will reduce the point in debate to a conclusion, and then the traverse is good. *Vaugh. 8.* But the defendant has not done so here, for he has traversed that 8 d. was for the maintenance of *Joseph Gorden*, where every part, that was for the maintenance of his wife or children, was in effect for the use and maintenance of him. For by the common law as well as by the law of nature the father is obliged to provide for his wife and children, and therefore every

What traverse good?
Saund. 22.

The husband is obliged to provide for his wife and children.

part of the 2 s. is a breach of the condition. 2. The traverse is too narrow, for he has not traversed any part of the 8 d. For if 2 d. was for the use or maintenance of *Joseph Gordon*, that was a breach of the condition. *Mr. Northey* and *Sir Bartholomew Shower* for the defendant argued, That the word children in the condition of the bond shall not be extended further than to *Joseph Gordon*, who was the child of *John Gordon*, and not to the children of *Joseph Gordon*; which will be a full answer to the first objection of the serjeants. 2. They took a distinction between a general issue and a collateral issue, and cited to maintain the traverse *Co. Li.* 282. 3 *Cro.* 84. *Dier* 115. b. upon the authority of which they concluded, that in this present case the traverse was not too narrow. 3. They took exception to the replication, that the justices of peace out of sessions could not make an order for an express sum for the maintenance of a poor man, but they agreed that they might sign a rate made by the parishioners. But to this the court answered, that all the justices of peace in *England* did so, and therefore though they have not authority to do it in strictness of law, yet *communis error facit jus*. And the court resolved, that the averment, that the 8 d. was for the maintenance and use of *Joseph Gordon* was ill, and only surplusage, for the 2 s. was for the use of *Joseph Gordon*, for that which is for the use of the wife and the children, is for the use of the father, because the father is obliged to provide for them; and so it was a manifest breach of the condition of the bond. Then the plaintiff has led the defendant out of the way, and he has followed him with an immaterial traverse. But they agreed that the traverse was good enough, as to the not traversing of the 8 d. and every part thereof. And they agreed to the distinction made by *Sir Bartholomew Shower* and *Mr. Northey*. But then rejecting this averment out of the case, and the traverse also, it is apparent, that this Money came to the use of *Joseph Gordon*, which was a breach of the condition of the bond. And therefore upon the merits of the cause the court said, that they gave judgment for the plaintiff. *Note*, That where it is said in the breach, that the 2 s. were for a week then past; altho' this was objected to be too uncertain, yet it was held good enough, because this bond cannot be sued again.

Two justices
out of sessions
cannot make
a rate to main-
tain the poor.

*Communis er-
ror facit jus.*

Easter Term

7 Will. 3. C. B.

Sir George Treby *Chief Justice.*

Sir Edward Nevill

Sir John Powell

Sir Thomas Rokeby

} *Justices.*

Brittel vers. Bade.

Ejectment for lands, &c. The defendant pleads, that the lands are held of the dean and chapter of *Worcester*, *ut de manerio de D.* which is ancient demesne, &c. The plaintiff replies, *quod bene et verum est*, that the lands aforesaid *tenentur de decano et capitulo Wigorniae ut de manerio de D.* which is ancient demesne, but he farther saith, that the lands are copyhold lands parcel of the said manor, &c. The defendant rejoins, *quod ex quo praedictus* the plaintiff *cognovit*, that the lands are ancient demesne, it is not material, whether they are copyhold lands or freehold, &c. The plaintiff demurs. And serjeant *Girdler* for the plaintiff argued, that the rejoinder is ill, for copyhold lands are of a nature so base, that the party cannot have a writ of right close for them. *F. N. B. 12. a.* And if they shall be tried in the court of the lord, he in effect will be both judge and party. And for this reason they shall be tried by ejectment at common law. And he cited a case *Mich. 6 Will. 3. Mar. C. B. Rot. 553.* where in ejectment the defendant pleaded, that the lands, for which the ejectment was brought, were ancient demesne; the plaintiff replied, that they were copyhold, &c. and upon demurrer it was adjudged for the plaintiff. And of this opinion was the whole court. But then serjeant *Trinder* for the defendant took exception to the replication, that it was repugnant to itself; for

S. C. Salk.

185.

Ancient demesne is no plea in ejectment for copyhold lands.

1 Salk. 56.

Writ of right close lies not for copyhold lands.

F. N. B.

11. m.

21 Affis. 13.

2 Cro. 559.

3 Lev. 405.

Copyhold
lands are par-
cel of the ma-
nor, and not
held of the
manor.

by saying *tenentur, &c. ut de manerio*, the plaintiff confesses, that the lands were freehold; for copyhold lands cannot be holden of the manor, but are parcel of the manor itself, which consists of demeans and services; and then when the plaintiff says, that they are copyhold lands, this is repugnant to what he had said before; and therefore it is void. And of this opinion were *Treby* chief justice, *Nevill* and *Rokeby* justices. But *Powell* justice *contra*. For one says in common speech, that copyhold lands are held of the manor. And *Treby* chief justice said, that the jurisdiction of the court of the lord of the manor extends to lands held of the manor, and not to lands parcel of the manor. And therefore by the opinion of three justices the writ was abated.

Yaxley vers. Rainer.

Intr. *Hill.* 6 *Will.* 3. C. B. Rot. 307.

DEBT brought by the plaintiff, lord of the manor of *Yaxley bull's ball*, against the defendant a copyholder of the same manor for a fine for licence to alien copyhold lands; and he declares, that there is, and time whereof, &c. was, a custom within the manor of *Yaxley bull's ball*, that all the copyholders within the same manor have used, time whereof, &c. to pay to the lord of the said manor upon every alienation of the said copyhold lands a fine for licence to alien. That the plaintiff was lord of the said manor, and that the defendant was a copyholder of the same manor. And that the plaintiff gave licence to the defendant to alien, for which the plaintiff assessed so much for a fine, and gave day to the defendant to pay it at *Yaxley ball*; that the defendant aliened, and did not pay the fine to the plaintiff; by which an action accrued to the plaintiff, &c. The defendant imparles; and then as to part he pleads a tender. And to this the plaintiff replies, that the defendant shall not be admitted to plead it after an imparlance, &c. The defendant rejoins, *nul tiel record* of the imparlance, and this was found against the defendant. As to the other part the defendant pleads *nil debet*, and verdict for the plaintiff. And serjeant *Rotherham* moved in arrest of judgment, that the declaration was ill, because it did not appear, that the place where the money for the fine was appointed to be paid was within the manor of *Yaxley bull's ball*; but rather it appeared, that it was appointed to be paid out of the manor, for it was appointed to be paid at *Yaxley ball*, which is not said to be within the manor. And it shall not be intended to be the same with *Yaxley bull's ball*. And the lord cannot appoint a place for payment out of the manor; for then the tenant might be forced to go all over *England* in

Tender is no
plea after im-
parlance.

1 *Lutw.* 238.

Comb. 50.

Bro. Tender,

p. 22.

Ibid p. 31.

Freeman 149.

Post. 254.

in quest of the lord, to the tenant's great prejudice. And he compared it to the case in *Latch* 122. *Grey* vers. *Ulfess*. But *Levinz* serjeant for the plaintiff agreed the case in *Latch*, and the reason of it was, because rent ought to be paid upon the land. But in the principal case the fine is collateral. And besides, the court will not intend (especially after a verdict) that the place was out of the manor; since this intendment would deprive a man of a right, that accrued by a kind of contract. And that the lord may assess a fine out of the manor, all agreed. Then why may not he make it payable out of the manor also? And it was adjudged accordingly by the whole court, and judgment was given for the plaintiff. But if it had been for a forfeiture, the court said that it might have been otherwise.

The lord appoints a fine to be paid out of the manor, and good.

N

Trinity

Trinity Term

7 Will. 3. B. R. 1695.

Sir John Holt Chief Justice.

Sir William Gregory

Sir Giles Eyre died } *Justices.*

3 June in this term.

Sir Samuel Eyre

Selway vers. Holloway.

Goods deli-
vered to a car-
rier.

Cro. Jac. 330.

1 Ro. Abr. 6.

pl. 4.

Co. Litt. 89.

a.

Mo. 462.

4 Rep. 84.

AN agreement was made between *Merry* and *Selway* now plaintiff for a certain parcel of hops for so much money, and that *Merry* upon his delivery of them to *Holloway* the now defendant (who was a common carrier) should have his money. *Merry* brought his action for this money, and recovered, upon evidence that the hops were left at the inn where *Holloway* lodged, without proving any delivery to *Holloway* or his servant; but only a woman (who had served *Holloway* before, but had quitted his service for five years) said to the carman, if he laid them down *Holloway* would find them. And upon the trial it was proved, that there were many carriers who lodged at the same inn, but none of them went out the same day. *Holt* chief justice not approving this verdict, the cause being tried before him, a new trial was granted, and *Merry* had another verdict given for him. Upon which *Selway* brought this action against *Holloway* the carrier; and some of the jurymen, who had been jurymen in the other cause between *Merry* and *Selway*, being upon the jury in this cause, gave a verdict for *Holloway*, which in effect was contrary to their former verdict; for if they were not delivered to *Holloway*, as they have now found that they were not, then they ought not to have given a verdict for *Merry* against *Selway*. Upon which *Selway* moved for a new trial in this cause between him and *Holloway*. But the court said, that they could not help the

two former verdicts, but they were all of opinion that the hops could not be said to be delivered to *Holloway*; and therefore a new trial was denied.

Prynn vers. Edwards.

DEBT upon a judgment. The defendant pleads, that a writ S. C. 3 Salk. of error is brought returnable in the Exchequer chamber '45. upon the same judgment, which is yet depending, and prays, Conclusion in *quod eat inde fine die quousque, &c.* The plaintiff demurs. And abatement. adjudged for him, because the defendant ought to have concluded *quod breve cassetur.* But *eat inde fine die quousque, &c.* is a good Doct. Plac. conclusion, where excommunication is pleaded in abatement; be- 8. cause there resummons lies, but it does not lie in this principal case. But *per curiam* these actions are vexatious, and therefore See 2 Vent. not to be countenanced; and for this reason common bail has been 261. Biddulph v. Dashwood. often allowed in these actions. And *Holt* chief justice said, that a writ of error in effect superseded the judgment, to prove which he 4 Mod. 247. cited a case between *Reed* and *Pierpoint*, which in effect was Error super- thus: J. S. has judgment given against him for 20 l. and ac- sedes judg- knowledged a statute for 20 l. and died, having made J. N. exe- ment. 2 Lev. 397. cutor, and leaving assets only to the value of 20 l. J. N. brought 1 Mod. 121. a writ of error upon the judgment, and pending the writ he paid 3 Keb. 330. the statute; and it was adjudged, that he might justify it against Yelv. 29. the judgment, because it was superseded by the writ of error. 3 Cro. 734, 822. Judgment was given in the principal case, that the defendant should answer over. The same judgment was given *Mich. 7 W. 3.* Rowley vers. B. R. between *Rowley* and *Rapson* for the same reasons. And Rapson. then it was resolved, that a writ of error pending is a good plea Carthew 2. in a *scire facias* upon a judgment. The same judgment was given Skin. 590. *Mich. 8 Will. 3.* B. R. between *Chaseworth* and *Merriman*. Mr. Error depend- Day. *Hil. 6 Will. 3.* In the Exchequer chamber all the justices ing upon a judgment is a and barons (except baron *Turton*) were of opinion, that in debt good plea in *scire facias* up- upon judgment, error brought upon the judgment is a good plea on it. But see Tr. 2 An. in delay *quousque, &c.* but they did not give judgment. Between B. R. Loder King and *Tuck.* v. Greenwood. King v. Tuck.

Rex vers. Bithell.

Bithell being committed to the keeper of *Newgate*, to be kept S. C. 5 Mod. in safe custody, until he should pay a fine, which was set upon 19. him by the court at the *Old Baily*, upon a conviction of having Salk. 348, exchanged broad money for clipped, against the new act of parlia- 350. ment, procured a *habeas corpus*, to bring him to the King's Bench, Vaugh. 139. in order to be turned over to the *Marshalsea*, pretending that there Bithell's case. were several actions depending against him. To which *habeas cor- pus*

pus the keeper of Newgate returned, that *Bitbell* was committed to him, safely to be kept in custody, *virtute cujusdam ordinis curiae* of the sessions at the Old Baily, *tenor cujus sequitur in hac verba*, viz. that *William Bitbell* is known to have exchanged broad money for clipped, *ideo consideratum est per curiam quod praedictus Willelmus Bitbell solvat domino regi mille libras bonae et legalis monetae Angliae pro fine, et remaneat in gaola de Newgate quousque, &c.*

Sir *Bartholomew Shower*, Mr. *Northey*, &c. took exception to this return.

1. That it appears by this return, that there was no commitment, for it is said, that *Bitbell* was committed *virtute cujusdam ordinis*, in which order no commitment appears.

2. It does not appear, that *Bitbell* was present in court, and then the court could not commit him without process of *capias*.

3. It does not appear, that *Bitbell* was in prison before; and no implication by the word *remaneat* shall aid it.

4. That every commitment ought to be to the immediate officer of the court, and therefore in this case it ought to have been to the sheriff of *Middlesex*, who was the immediate officer of the court, and not to the gaoler of *Newgate*, who is but a subordinate officer of the sheriff, and no officer of the court.

Though the return of a *habeas corpus* is not formal, yet it may be sufficient.

A man committed ought to be to the immediate officer of the court. The party committed ought to be present in court.

Against these objections the King's council argued, that although the return was not so good as it might have been, yet sufficient cause appeared upon the return, to remand him. And for this reason (as they told me, for I was not present in court when judgment was given) the prisoner was remanded to *Newgate*, notwithstanding that the persons, who were pretended to be bail for him in the actions depending against him in this court, declared that they rendred him in discharge of themselves, the court only regarding it as a trick. But the court was of opinion, that the return was not good, for when a man is taken in execution he ought to be committed to the sheriff, who is the immediate officer of the court; and the party ought to be present in court, when he is committed; otherwise the want of a writ is not supplied. And by *Holt* chief justice, if a man, against whom judgment is given in the King's Bench, be walking in *Westminster-hall*, the King's Bench may send a tipstaff, to bring him into court, and the court may commit him in execution. But otherwise, if he were at *Charing-cross*.

Rex

Rex & Regina *vers.* Kempe.

A *Scire facias* issued out of the petty bag in Chancery, to repeal letters patent bearing date the 29th of December in the 27th year of the reign of King Charles the Second, by which that King granted to the defendant the office of searcher in *Plymouth*. The case was shortly thus: King Charles the Second granted this office to *John Martin* *durante beneplacito*. Afterwards by other letters patent, reciting the grant to *Martin*, he granted this office to *Fryer* for life, to commence after the death, surrender, or forfeiture, of *Martin*. *Fryer* afterwards surrendered his letters patent to the King; who afterwards, in consideration of the surrender of the letters patent of *Fryer*, granted by letters patent this office to *Henry Kempe* for life, to commence after the death, surrender, forfeiture, or other determination, of the estate of *Martin*, and afterwards to *William Kempe* for life (who is the now defendant) to commence after the death, surrender, forfeiture, or other determination of the estates, of *Martin* and *Henry Kempe*. *Henry Kempe* dies, and then King Charles the second dies; and now this *scire facias* is sued against the defendant, to repeal these letters patent.

S. C. 4 Mod.
275, 280.
Skin. 446.
Salk. 465.
Carth. 350,
252.
3 Danv. Ab.
161. p. 12.
Bro. patents,
p. 30.
39 H. 6. 48.
Bro patents,
p. 52.
Ibid p. 54.
Ibid p. 57.
Dier. 259,
270.

This case was argued several times by *Gould* King's serjeant and serjeant *Pemberton* for the King, and by Sir *Thomas Powis*, Mr. *Northey*, &c. for the defendant. And now Sir *Samuel Eyre*, and *Holt* chief justice, (there being but two judges in court) gave their opinions in solemn arguments for the defendant. Sir *Samuel Eyre* justice for the defendant said, that the principal *quaere* was, whether the letters patent of *Fryer* were good? For admitting that they were good, the defendant ought to have judgment: For the consideration of the letters patent of *Kempe* was the surrender of those of *Fryer*; and if those of *Fryer* were good, then the consideration of those of *Kempe* was good, and by consequence the grant. But if the letters patent of *Fryer* were ill, then there was no consideration in the patent of *Kempe*, and the King was deceived in his grant, and therefore it was void in law. But he was of opinion, that the letters patent of *Fryer* were good; against the validity of which it was objected, 1. That an estate for life, as this of *Fryer* was, could not depend upon an estate at will; to which objection he answered, that this grant of office did not resemble that of lands, for an office is no longer in being than it is in grant by the King; for the King has no reversion of an office, nor can he grant it by that name, as 8 *Hen.* 7. 12. 6 *Hen.* 7. 14. 2 *Brownl.*

If the King grants in consideration of the surrender of void letters patent, the grant is void.

The King cannot grant the reversion of an office, but he may grant it in reversion.

242. 1 *Cro.* 279. 8 *Hen.* 7. 1 & 3. 3 *Cro.* 236. But the King

Freehold of
an office may
be granted to
commence in
future, with-
out a parti-
cular estate.

may grant it in possession, or to take effect *in futuro*. 8 Hen. 7. 12.
1 Hen. 7. 29. 6. 8 Co. 55. Co. Li. 3, 6. 1 Cro. 279. 3 Leon. 31.
9 Co. 47. Nor is a particular estate necessary, to support this grant
of the office *in futuro*.

Estate at will
is not surren-
derable or for-
feitable.
See 1 Rep. 23.
pl. 27, 28.

2. It was objected, that the King was deceived in his grant to *Fryer*, which was to commence after the death, surrender or forfeiture of *Martin*; for the estate of *Martin* being only an estate at will, it could not be surrendered or forfeited; for those acts, which in cases of other particular estates will amount to a surrender or forfeiture, in case of an estate at will amount to a determination of the will; and therefore there cannot be a surrender or forfeiture of an estate at will (which last assertion Mr. justice *Eyre* agreed to). And in fact the estate of *Martin* did not determine by his death, surrender or forfeiture, but by the death of King *Charles* the second; and therefore this grant to *Fryer* could not take effect, because *Martin's* estate did not determine by his death, surrender or forfeiture.

When the
King shall be
deceived in
his grant.

To answer which objections he said, that it ought to be considered, 1. When the King shall be said to be deceived, to avoid a grant. 2. In what manner the grant of the King shall take effect, and what construction it shall have.

As to the first, where the matter expressed to be suggested on the part of the grantee is false, and to the prejudice of the King, there if the King be deceived, that will avoid the grant.

But where the words are the words of the King, and it appears that he has only mistaken the law; there he shall not be said to be deceived, to the avoidance of the grant. As if there is an estate *in esse* not recited, or when the grant is recited to be of less value than it actually is, by the suggestion of the party, there the King is deceived, and the grant shall be void. For in the first case the intent of the King was, to grant an estate to take effect in possession, which intent cannot take effect, because there was an estate before *in esse* not recited. In the second case if the grant were good, the King should grant more than he had designed to do. But if the King is not deceived in his consideration, nor otherwise to his prejudice, but his intent was to pass the lands, only he is deceived in the law, nevertheless his grant shall be good. To warrant which diversity, he cited Co. Li. 3. Dier. 352. a. 197. b. 2 Cro. 34. 2 Brownl. 242. 11 Co. Auditor *Curl's* case. 1 Mod. 196. Lane 75. 31 Hen. 6. 23. 6 Co. Lord *Chandos's* case.

2. In what manner these letters patent of the King shall be construed, when he is mistaken in his own words and affirmation. And he said, that it is a rule in law, that where the King is not deceived by the suggestion of the party, and it appears by the letters patent that the intent of the King was that the patentee should take, such construction shall be made, that the grant shall not be void. 6 Co. 6. 10 Co. 67. 9 Edw. 4. 11. 8 Co. Earl of Rutland's case.

Now to apply this to the present case. In these letters patent to *Fryer* the King is not deceived, for the precedent letters patent are truly recited, and the suggestion of the party is true, and the intent of the King was, that *Fryer* should take by these patents; and therefore such construction ought to be made, as the grant may take effect.

And as to the commencement of this grant to *Fryer*, it seemed to him that the King's intent was, that *Martin* should hold it for his life; that is to say, that he would not determine his will during the life of *Martin*, but that after *Martin's* death the new letters patent should take effect. But since *Martin's* grant determined by the King's death, this grant of *Fryer's* shall commence after the death of *Martin*. And for these reasons he was of opinion that the defendant ought to have judgment.

Holt chief justice for the defendant said, that the question was, whether *Fryer's* letters patent were good? for if they are not, those of *Kempe* will not be good neither. But he was of opinion, that those of *Fryer* were good.

1. It was objected, that they were void, because they were not to commence upon the determination of the estate of *Martin*, but upon his death, surrender, or forfeiture. His death might happen, but not his surrender or forfeiture, because it was but an estate at will.

To which he answered, that an estate at will among common persons cannot be surrendered; because, being at the will of both parties, either of the parties may determine his will. But in the case of the King, it is not at the will of both parties, but of the King only, and the party cannot determine his will but by surrender. For if it be an office of trust, forbearance of execution is fineable; and surrender in such cases is constantly practised, as in the case of *Hale* chief justice and *Scroggs* chief justice.

An estate at will in the King's case is surrenderable being only at the will of the King.

Then

Then if this office granted at will was surrenderable (as by him it was) the expression of the King in his letters patent was proper enough.

2. It was objected, that it was not forfeitable.

Estate at will
forfeitable in
the King's
case.

To which he answered, that the King's tenant at will may be said to forfeit. For perhaps the King upon suggestion of crimes committed by the party, before he determined his will, shall be informed by inquisition of record, and then upon the very return of the inquisition the office is forfeited. But if it were an estate for life, then there ought to be a *scire facias* to repeal the letters patent.

Admitting then the law to be so, this grant to *Fryer* was good, and might have commenced after the death, surrender, or forfeiture of *Martin*.

But it was farther objected against this grant to *Fryer*, that suppose the King had determined his will during *Martin*'s life; yet the grant to *Fryer* could not have taken effect, because the estate of *Martin* did not determine by the death, surrender, or forfeiture of *Martin*; and then if the grant to *Fryer* were good, there would be a freehold to commence *in futuro*, which is against the rules of law.

To which he answered, that this grant would nevertheless have taken effect, but not till the time limited by the letters patent, which then must have been *Martin*'s death, and in the mean time the King might have granted it to whomsoever he pleased; and when *Martin* died, *Fryer*'s grant would have commenced.

Freehold
granted to
commence in
futuro.

And as to the objection that a freehold cannot be granted to commence *in futuro*, he answered, that it must be understood of a freehold *in esse*, as 5 Co. 93. *Berwick's* case; but a rent *de novo* may be granted to commence *in futuro*, or may be granted in fee with fractions, 1 Co. *Corbet's* case, or to commence upon any contingency; because it is a creature of the grantor, who may mould it in what form he pleases. And the grant of this new office resembles the grant of a rent *de novo*; for since there is no estate *in esse*, but it is new created by the King, he may mould it as he pleases. And although there is such an office as this of a searcher, yet the estate is new, and subject to any limitations. And no reasons can be given why a grant *in futuro* of such a new office should not be good, as well where there is such precedent estate,
as

as where there is none at all. For suppose, there being before a grantee for life, the King grants to another, to commence after the death of the grantee for life; this first grant for life is of no avail to make good the last grant, for the last grant is not a remainder, for then it ought to have been created at the creation of the particular estate; nor is it a reversion, for neither the King nor any other has any reversion of the office, and a grant by such name is void; but the King may grant an office in reversion; not in respect of the particular estate, but it is only a future interest to commence *in futuro*. 1 Cro. Young *vers.* Stawell, and Young *vers.* Fowler.

But if the King has the inheritance of an office, such a grant as this had been void. And it seemed to him, that the King's intent was, not to determine his will during *Martin's* life, but that after his death the grant to *Frier* should commence; and not to give opportunity to any solicitation, to determine the estate of *Martin* before his death. Lastly, *Frier's* letters patent being good, the surrender of them was a good consideration in the grant to *Kempe*, so that the letters patent granted to *Kempe* were good. And therefore judgment was given for the defendant.

Rook *vers.* Clealand.

Intr. Trin. 6 Will. & Mar. C. B. Rot. 508.

A Man, seised of a reversion expectant upon an estate for life, s. C. S. tw. bound himself and his heirs in a bond, and died living the 503. tenant for life; this reversion shall be *assets* in the hands of the heir. Adjudged this term in C. B.

Walter *vers.* Rumbal.

Walter brought an act of *trover* against the defendant *Rumbal* S. C. 4 Mod. 385, 390. for 6 hogs, 5 pigs, &c. Upon not guilty pleaded the jury 1 Salk. 247. find a special verdict; That *John Smith* the 16th of October Distress sold 8 Car. 2. was seised in fee of a mesuage and a certain parcel of land according to 2 Will. & Mar. 1. containing 200 acres of land, part of which lay in the hundred of *Kinalsey* in *Wiltshire*, and part in the hundred of *Andover extra* in cap. 5. sec. 2. the county of *Southampton*. And being so seised, he demised it by S. C. Comb. 336. indenture to *John Walter* for 21 Years, reserving 43 l. 10 s. rent S. C. 12 Mod. 53. annually to be paid at two equal portions at *Lady-day* and *Michaelmas*. That the lessee entred and was thereof possessed by virtue of *ibid.* 76. the lease aforesaid. And that rent being in arrear, the defendant
P as

Notice to the
plaintiff is
good.

as bailiff to *John Smith* distrained the cattle, for which the action is now brought, being *levant* and *couchant* upon this land, viz. part upon the parcel of the land which was in *Kinalsey*, and part upon the other parcel which was in *Andover extra*. They find that the plaintiff was owner of this cattle, and that the defendant after the distress taken gave notice to the plaintiff according to the statute of 2 Will. & Mar. ses. 1. cap. 5. and that the plaintiff *Walter* did not replevy them within five days. And that after the five days the defendant sent for the constable of *Kinalsey* and the constable of *Andover extra*. That by two appraisers, sworn by the constable of *Kinalsey*, and in the presence of the constable of *Andover extra*, the cattle were appraised. And that afterwards the defendant sold them, and left the overplus with the constable for the use of the plaintiff, &c. And serjeant *Gould* and Mr. *Pratt* for the plaintiff objected,

Notice to the
owner of the
goods.

1. That the notice is ill, for the act says, that it should be at the chief mansion-house or other notorious place upon the premises; but in this case it was given to the plaintiff himself. *Sed non allocatur*; for *per curiam* the intent of the act was only, that the party should have notice, which is performed by this means, better than if it had been left at the house or other most notorious place.

2. They objected for the plaintiff, that the jury have found, that notice was given to the owner of the goods, and not to the tenant of the land. And although the act is in the disjunctive, yet it ought to have a reasonable construction; and it is more reasonable, that the notice should be given to the tenant of the land, because he might shew that the rent is satisfied, which does not lie in the knowledge of the owner of the cattle. *Sed non allocatur*; for the act has expressly provided, that notice may be given to the owner of the goods. But if the tenant had sued a replevin, then the notice must have been given to him; but notice to the owner sufficiently affects the owner, and the plaintiff is found owner of the cattle, therefore notice to him is sufficient.

3. They objected, that the jury had not found, that the constable of *Andover* administered the oath to the appraisers, but that he was only present. Now the constable of *Kinalsey* had no jurisdiction over that which arose within the hundred of *Andover*, and therefore the goods distrained within the hundred of *Andover* were sold without having been appraised by sworn appraisers, for the oath administered by the constable of *Kinalsey* as to those goods in *Andover* was void, which is contrary to the direction of the statute. And although the constable of *Andover* was present, that does not aid

aid it; no more than where the mayor of a corporation, being a justice of peace, made an order and signed it, and afterwards this order was signed by another justice of peace, and it was ruled naught, upon 14 Car. 2. cap. 12. because the last justice was not actually present at the signing of it as the statute provides. So here because the constable of *Andover* did not administer the oath, though he was present, the appraisement of these goods in *Andover* was ill. But to this it was answered by the court, that the oath administered by the constable of *Kinalsey* was sufficient, for the lands, although they lie in divers counties, yet they shall be intended contiguous, for they were demised by one demise, rendering one intire rent; then the distress being lawfully taken for one intire cause, as it was here, the chasing of them is a continuance of the taking, and the difference of the counties will make no diversity of the distresses; but the distrainer, as the case was, had liberty to chase them all into *Wiltshire*; then the officer where the distress is chased, is within the act, because the distress is there lawfully in the custody of the law; and therefore the oath, administered by the constable of *Kinalsey*, good for the whole. But it was objected to this, that the words of the act are [the officer where such distress shall be taken] and now the goods, which were taken in *Andover*, cannot be said to be taken in *Kinalsey*; to which the court answered, that the chasing of the distress over is a continuance of the taking of the distress, and the party, since it was for one intire cause, cannot sever the distress, but ought to chase them all together, and impound them in one pound, by 1 & 2 Ph. & Mar. cap. 12.

Order signed by two justices according to 14 Car. 2. cap. 12.

Lands in divers counties demised by one demise, rendering rent, distress may be taken in either of them.

Distress taken for one cause cannot be severed.

4. It was objected, that the jury have not found, that the tenant had not brought a replevin within the five days. *Sed non allocatur*; for the jury have found, that the owner did not replevy within the five days, which, as to the plaintiff who is the owner, is sufficient.

The owner brings not replevin.

5. It was objected, that they do not find, that the goods were sold for the best price. To which the court answered, that that shall be intended, since the appraisers were sworn. For which reasons judgment was given for the defendant. But *Holt* chief justice said in this case, that if lands in *Middlesex* and *Hampshire* be demised by one demise, reserving one intire rent, the distress taken in *Middlesex* cannot be chased into *Hampshire*, because the counties are not adjoining.

Distress taken in two counties, which are not adjoining, cannot be chased out of the one county into the other.

Masters

Masters *vers.* Lewis.

S. C. 3 Salk.
49.
S. C. Skin.
516.
Carth. 344.
5 Mod. 75,
92.
Foreign at-
tachment in
London will
not attach
goods of an
intestate by
levying a
plaint against
the ordinary.

Charles Masters was indebted to Gostwright, and had also a Debt owing to him by Lewis the defendant. Masters dies intestate, and Gostwright enters a *caveat* in the spiritual court, and then enters a plaint in the court of the sheriffs of London against the archbishop of Canterbury as ordinary, to attach this debt in the hands of Lewis, and upon default has judgment and execution. Then the archbishop grants administration to Alice Masters, who brings this *indebitatus assumpsit* against Lewis, who pleads this foreign attachment in bar. The plaintiff demurs, and Sir Bartholomew Shower and Mr. Dee for the defendant argued, that the foreign attachment in this case was good, and the defendant's debt well attached, and therefore he ought not to be liable over to the plaintiff. 1. They said that this foreign attachment had had the approbation of all courts for more than a hundred and fifty years; and there was no inconvenience, for if the defendant, against whom the attachment is sued, comes within the year and day, he may sue a *scire facias* against the plaintiff, to disprove the debt. 2. They said that it had been allowed in a case of the very same nature, *Calthrop, rep.* 66. And though it may be objected, that this may work a *devastavit* in the administratrix, for by this means a debt upon a simple contract may be satisfied before a debt upon specialty; they answered, that the administratrix might well plead in an action brought against her, *plene administravit*; for she is not chargeable for more than that which comes to her hands. And by 5 Co. Snel-ling's case, the administrator is bound by the custom of London, to pay a debt by simple contract as well as a debt upon specialty. And although in this case it may be objected, that the ordinary was not liable to any action of debt, they answered, that by 10 Ed. 2. cap. 19. the ordinary is liable, so long as he hath *as-sets*, 2 Inst. 397. But they said, that admitting, that this judgment in the attachment was erroneous, nevertheless so long as it continues in force, it shall bind the parties. For which reasons they prayed judgment for the defendant.

Foreign at-
tachment
charges only
a debtor.
Ordinary no
debtor, before
goods come to
his hands.
action of the defendant.

But Northey *econtra* for the plaintiff. Of which opinion was Holt chief justice, Sir Giles Eyre and Sir Samuel Eyre justices. For, 1. Foreign attachment (by them) cannot charge any person but a debtor, and the ordinary is no debtor, before goods come to his hands. 5 Co. 82. 9 Co. Hensloe's case, F. N. B. 210. b. 2. Garnishment cannot be, but where the garnishee is liable to the

action

action of the defendant; for the garnishee may plead all things that the defendant might have pleaded. But in this case the ordinary, who was the pretended defendant, could not have had an action against *Lewis* for this money. Therefore if this foreign attachment shall be allowed good, it will be in effect to adjudge a power in the attachment to give an action, to a person who cannot have one by law, which the attachment cannot do. But where there is an executor or administrator, a foreign attachment may well be allowed, because they may be sued, or may sue. And as to the objection, that the judgment although erroneous shall bind the parties until it be reversed, the court answered, that *non valet exceptio ejus rei cujus petitur dissolutio*. And the administratrix, in this case could not reverse this judgment, because she is not party to the record. And by *Holt* chief justice, *Snel-ling's* case, 5 Co. 82. where it is said, that the administrator is bound by the custom to pay a debt upon simple contract, &c. is not sound law. And afterwards, *Mich. 7 Will. 3. in B. R. 1695.* (Sir *Giles Eyre* being dead, and Sir *Thomas Rokeby* made justice in his place) the whole court of King's Bench gave judgment for the plaintiff.

Ordinary cannot have debt against an intestate's debtor.

Non valet exceptio ejus rei cujus petitur dissolutio.

Memorandum, Sir Edward Ward knight, attorney general, was this term made serjeant at law, and lord chief baron of the Exchequer, in the place of Sir Robert Atkins (but this was *no-lens volens*.) And Sir Thomas Trevor solicitor general the eighth of June succeeded in the office of attorney general. And Sir John Hawles knight, of Lincoln's Inn, succeeded in the office of solicitor general. And Sir Salathiel Lovell knight, recorder of London, was made King's serjeant.

Q

Mich.

Mich. Term

7 Will. 3. B. R. 1695.

Sir John Holt Chief Justice.
Sir William Gregory
Sir Thomas Rokeby
removed this term out
of the Common Pleas } *Justices.*
in the room of Sir
Giles Eyre
Sir Samuel Eyre

Sir John Dalton vers. Janfon.

S. C. 1 Salk. 10.
 5 Mod. 89.
 Case upon the
 custom against
 a carrier and
 trover cannot
 be joined.
 Keb. 852.
 p. 57.
 Ibid. 870. p.
 19.
 12 Mod. 73.
 Comb. 332.
 S. C.
 3 Salk. 204.

ACTION upon the case grounded upon the custom of the realm against a common carrier, and *trover*, were joined in one declaration. Upon not guilty pleaded, verdict for the plaintiff. And it was moved in arrest of judgment, that these actions cannot be joined; for although the case upon the custom seems to be founded upon a *tort*, yet it sounds in contract; and then an action founded upon contract cannot be joined with an action founded upon a *tort*, as *trover*. And 1 *Sid.* 244. *Matthew vers. Hopkins*, for this reason in a like case judgment was arrested. And of the like opinion was the whole court at present, and therefore judgment in this case was arrested. See 1 *Ventr.* 223. *Owen vers. Lewin contra.* See 1 *Sid.* 223. *Wright versus Berle.*

Pense vers. Prouse.

MR. Pratt moved for a prohibition to the consistory court of S. C. Carth. the bishop of Exeter, where his client was libelled against ^{360.} 5 Mod. 389. for a rate assessed by the church-wardens by custom for repair of the church, as well the chancel as the nave of the church. And resolved, 1. That the parishioners, and not the church-wardens, ought to assess the rate. 2. That the parson ought to repair the chancel and not the parishioners, but that the parishioners ought to repair the nave of the church. And by Holt chief justice, by the canon law the parson ought to repair the whole; but by the custom of England the parson shall repair the chancel, and the parishioners the nave of the church. And by the custom of London the parishioners shall repair the chancel also. But Rokeby justice was of opinion, that the parishioners ought to contribute to the charge of the ornaments of the chancel, but Holt doubted of that. Then Sir Bartholomew Shower moved, that a prohibition should be granted, only *quoad* the suit for the rate for the chancel. But resolved, that the prohibition shall be for the whole, because it is but one rate, and intire; but if a man libel for two distinct things, the one of which is of ecclesiastical consufance, and the other not, a prohibition shall be granted, *quoad* that which is of temporal consufance, and they of the court Christian shall proceed for the other. Therefore in the principal case a prohibition was granted.

All the parishioners, or the majority of them, ought to assess the rate to repair the church.

2 Ro. Abr.

^{291.} 1 Vent. 361. Comb 344.

Parishioners ought to contribute to the charge of the ornaments of the chancel.

When a prohibition shall be granted *quoad*.

Herbert vers. Walters.

REplevin. The defendants as overseers of the poor of the parish avow for a rate, set upon the plaintiff by force of 43 Eliz. cap. 2. The plaintiff replies *De injuria sua propria absque tali causa*, and upon this they were at issue. And at the trial, after appearance, the plaintiff was nonsuit. And Sir Francis Winnington moved for a writ of inquiry of damages, and after debate at several days, resolved, that a writ of inquiry shall be granted. For if the jury try the issue, and do not find damages in case where damages are recoverable, this shall not be supplied by a writ of inquiry, because the damages are part of the verdict, and if the jury had found excessive damages, the party might have had an attaint. But in this case, although the jury by the statute (notwithstanding they did not try the issue) might have been charged to find damages; yet if they had found them, it had been but an inquest of office, and by consequence the party could not have had an attaint if they had been excessive. And the reason of this

S. C. 5 Mod. 76, 77, 118. 1 Salk. 205. Skin. 595, 596.

Carth. 362. 12 Mod. 85. In avowry upon 43 Eliz. cap. 2. if the plaintiff at the trial is nonsuit, writ of inquiry may be awarded.

Where a writ of inquiry may supply a defect in a verdict.

Waterman v. Yea, & Lyde esq; v. Laurence in C. B. Mich. 30 Geo. 2. S. P. Ca. in Parl. 201.

Upon de-
murrer to the
evidence the
jury may af-
sess damages,
or a writ of
inquiry may
be awarded.

this does not differ from the case where there is a demurrer to the evidence at the trial, the jury may assess conditional damages, and if they do not, a writ of inquiry may be awarded. 1 Cro. 143. *Darrose vers. Newbott*. Besides that, 1 Roll. Rep. 272. *Brampton's* case, and 2 Roll. Rep. 112. are express authorities in point. And this is not like the case of *Ward vers. Culpeper*, Mich. 20 Car. 2. B. R. 1 Sid. 380. where in replevin the defendant avowed for a rent-charge, and issue being joined, the jury found the value of the cattle and damages, but did not find what rent was arrear according to the statute 17 Car. 2. cap. 7. and resolved, upon a motion for a writ of inquiry, that it cannot be granted, because the statute says that the same jury shall inquire of the value of the cattle and of the rent arrear; but the 43 Eliz. last paragraph, gives the party his election, either to have the jury find the damages, or to have a writ of inquiry. And *Holt* chief justice said that he remembred a case 17 Car. 2. B. R. *Burton vers. Robinson*. Detinue for a charter, verdict for the plaintiff upon issue joined, and the jury found damages, but did not find the value of the deed; and upon motion for a writ of inquiry the court doubted, whether it should be granted; but afterwards he was informed, that a writ of inquiry was granted, contrary to *Cheyney's* case and (by him) contrary to law.

Raym 124.

1 Sid. 246.

1 Keb. 882.

In detinue if
the jury omit
the value of
the deed, this
cannot be sup-
plied by writ
of inquiry.

Young vers. Rudd.

S. C. 5 Mod.
86.

Carth. 347.

2 Salk. 627.

Assumpsit. The
plaintiff de-
clares for
wares sold.
The defen-
dant pleads
acceptance of
a hat in sat-
isfaction of the
promises (not
of the money
due by them)
a good bar.

5 Rep. 117.

Mod. 677.

Comb. 346.

12 Mo. 85.

Sty. 239.

Assumpsit and *quantum meruit* by an apothecary for medicines and attendance upon the defendant when he was sick, &c. The defendant pleads, that he gave to the plaintiff a beaver hat in satisfaction of those promises, and that the plaintiff accepted it in satisfaction. The plaintiff, *protestando* that the defendant did not give the beaver hat to him in satisfaction, &c. traverses the taking by him in satisfaction. The defendant demurs. And Mr. *Hall* took exception to the plea, that it is pleaded in satisfaction of the promises, whereas it ought to be in satisfaction of the money due upon the promises, and compared it to the case of *Neal vers. Sheffield*, Yelv. 192. where acceptance of a load of lime was pleaded in bar of a bond, which was upon condition, and adjudged no plea, because it ought to have been pleaded in satisfaction of the sum of money contained in the condition. But, by the court, the cases differ, for in the case cited a release of the condition had not been a bar to debt upon the bond; but here a release of the promises had been a good bar in this action, and therefore the defendant has pleaded well enough. Then Mr. *Northey* took exception, that the traverse in the replication was ill, for the traverse ought to be to the most material part, which is here the gift; for if the defendant

defendant gave in satisfaction, and the plaintiff received it; whether the plaintiff received in satisfaction, is not material; for it must be, if he will receive it, that he receive it to that intent, for which the defendant gave it. As if *A.* owes *B.* 20 *l.* upon a bond and 20 *l.* upon simple contract, and *A.* pays *B.* 20 *l.* in satisfaction of the money due upon the bond, and *B.* says that he will accept it in satisfaction of the money due upon simple contract, nevertheless if he accept it, it shall be adjudged, that he accepted it for the money due upon the bond. Therefore in this case the traverse ought to have been to the gift. But Mr. *Hall* for the plaintiff argued, that of necessity this new agreement must be by the mutual assent of the parties, and then the acceptance is as material as the gift. Of which opinion was *Holt* chief justice: For if the defendant had pleaded the gift, without an averment that the plaintiff accepted it, the plea had been ill. And *Holt* cited *Hob.* 178. *Erle* *vers.* *Tuck*, where the acceptance was traversed; and therefore (by him) both the gift and the acceptance are traversable; and therefore he was of opinion, that judgment should be given for the plaintiff. *Rokeby* justice was of opinion for the plaintiff, but for another reason, because since the plaintiff had taken by protestation the gift, and had traversed the acceptance, it does not appear that there was any receipt. But if there had been any receipt confessed, he seemed to incline, that the acceptance had not been traversable for Mr. *Northey's* reasons. The same case between *Yelverton* and *Salisbury*, and the same judgment this term.

Gift or acceptance are traversable.

Yelverton v. Salisbury.

Rex *vers.* *Leason* and *Edwards.*

THE defendants were taken by a messenger, and kept in custody several days in *Middlesex*; and the beginning of this term they entred their prayer according to the *habeas corpus* act. After being brought before Sir *William Trumball* secretary of state, he committed them to the *Marshalsea* for high treason in conspiring the death of the King, which fact was supposed to be committed in *Surrey*. And now being brought to the King's Bench by *habeas corpus*, Sir *Francis Winnington* and Sir *Bartholomew Shower* moved, that they should be bailed. But denied by the court, for the intent of the *habeas corpus* act was, that the prayer should be entred, where the party ought to be tried; which in this case must be at the assises in *Surrey*, for the King's Bench cannot originally hold plea of felony arising out of *Middlesex*, and therefore the King's Bench will remand the prisoners to the *Marshalsea*. *Ex relatione m^{ri} Ives.* *Hill.* 8. The lord *Montgomery*, being indicted in *London* for high treason for conspiring the death of the King,

The prayer to intitle a man to the benefit of the *habeas corpus* act must be entred in the county where he ought to be tried. *Comb.* 111.

The King's Bench does not hold plea originally of a felony arising out of *Middlesex*.

Lord *Montgomery's* case.

R

entred

entred his prayer in the King's Bench ; but adjudged that it ought to be entred at the *Old Baily*.

Leward & ux' *vers.* Basely.

S. C. 1 Salk.
407.
Bro. trespass,
p. 128.

1 Mod. 36.
1 Sid. 441.

A Man cannot
justify an af-
fault in de-
fense of his
close.

2 Lut. 1483.
A wife may
justify an af-
fault in de-
fense of her
husband.

Servant may
justify an af-
fault in defense
of his master,
but not *e con-*
tra.

A Man cannot
justify an af-
fault in de-
fense of his
horse.

Ow. 150. *contra*. Bro. trespass, 189. Ibid. 217. Hawk. P. C. 131. cap. 61. f. 24. Ibid. 134. c. 62. f. 3.

S. C. 2 Salk.
644.

5 Mod. 87.
New trial
shall not be
granted in
penal actions,
where the
verdict is for
the defendant,
though con-
trary to evi-
dence.
Horton v.
hundred de
Edmonton.

TRespass, assault and battery, for a battery committed upon the wife. The defendant pleads, *de son assault demesne* of the wife. The plaintiffs reply, that the defendant went out to fight the husband, and that she being desirous to assist her husband, and to keep him from being wounded, *insultum fecit* upon the defendant. The defendant demurs. And Mr. Cartbew argued, that this *insultum fecit* was ill. And for that he cited a case between Jones and Tresilian, *intr. Trin. 21 Car. 2. B. R. rot. 1841*. Trespass, assault and battery; the defendant pleaded *de son assault demesne*; the plaintiff replied, that he was possessed of a close called Cupner's close, and that the defendant broke the gate and chased his horses in the close, and the plaintiff for defending his possession *molliter insultum fecit* upon the defendant: And upon demurrer adjudged a bad replication, for he should have said, *molliter manus imposuit*; but he could not justify an assault in defense of his possession. And this case the court agreed to be good law, but different from the present case; for this is a justifiable assault, for the wife may lawfully make an assault, to keep her husband from harm, and she has pleaded it so. In the same manner a servant may justify an assault in defense of his master, but not *e contra*, because the master might have an action *per quod servitium amisit*. So in this case, if the defendant lifted his hand to strike the husband, the wife might well justify an assault to prevent the blow. And if the fact had been otherwise, the defendant ought to have rejoined, *de son tort demesne*, and then it had been against the plaintiff. But a man cannot justify an assault in defense of his horse, or his possession, for there he ought to say, *molliter manus imposuit*. Judgment for the plaintiff, *nisi*, &c.

Smith *vers.* Frampton.

SMITH brought an action upon his case against the defendant, for negligently keeping his fire, by which the house of the plaintiff was burnt. And after verdict for the defendant Mr. Montague moved for a new trial, upon a suggestion that the verdict was against evidence. And he argued, that though it was a severe action, yet all actions were grounded upon reason, and that new trials had been granted against the hundred. *Trin. 1691. B. R. between Horton and the hundred of Edmonton*. A like case *Trin.*

5 Will.

3 Will. & Mar. C. B. So it is agreed 1 Sid. 49. between *Read* and *Dawson*, that a new trial may be granted to the defendant in an information in perjury where the King is not party, without consent of his council, and where he is party, with the consent of his council. But serjeant *Darnall* and Sir *Bartholomew Shower* *e contra*: That the court does not grant new trials where the verdict is for the defendant in penal actions, as perjury, forcible entry, &c. And in Hil. 4 & 5 Will. & Mar. in information against *Davies* for a riot, the judge before whom he was tried certified, that it was a verdict against evidence; nevertheless in motion for a new trial it was denied. So in Sir *John Jackson's* case, in information for subornation of perjury, serjeant *Maynard* produced several affidavits, that the most material witnesses were withdrawn by a trick of Sir *John Jackson*; and yet upon motion for a new trial it was denied; which case *Holt* chief justice said he remembered well. And the court after having considered this case several days resolved, that this being a case of hardship, and the jurors being judges of the fact, no new trial should be granted; though *Holt* chief justice, before whom it was tried, was dissatisfied with the verdict. And Mr. *Northey* said, that Mr. *Siderfin* is mistaken in the case of *Read* and *Dawson*, for 3 Will. & Mar. B. R. between the King and Queen and *Stone*, in information for perjury, a new trial was granted to the defendant without the consent of the King's council.

Smith and
Dormer v.
Parkhurst,
Hil. 12 Geo. 2.
Opinion of the
Court, that
the hardship
of the Case is
a reason for
refusing new
trials, and cited
2 Salk. 644.
2 Salk. 653.
Barnes, Pas.
6 Geo. 2.
fol. 311.

Davies's case.

Rex v. Stone.

Powers *vers.* Cook.

DEBT upon bond against the defendant, as executrix to *J. S.* The defendant pleads, that *J. S.* died intestate, and that administration was granted to her of the goods, &c. of *J. S.* and therefore *petit judicium si ipsa ad billam praedictam respondere debet.* The plaintiff demurs. And Mr. *Dee* for the plaintiff argued, that the plea is ill. For if the defendant administered the goods of *J. S.* before administration granted to her, she is chargeable as executrix *de son tort.* And therefore she ought to have traversed that she meddled before as executrix, as *Yelv. 115. 1 Brownl. 97. Lothbury & ux' v. Humfry* The plaintiff brings debt as administratrix to *R.* The defendant pleads, that *R.* made his will, and made him his executor; and upon demurrer adjudged an ill plea, because he should have traversed that *R.* died intestate. So 3 Cro. 565. *Bradbury v. Reynell. 810. Bethell v. Stanhope.* Sir *Bartholomew Shower contra.* That the books of 3 Cro. 565 & 810 are founded upon this reason, that the party was confusant of the intermedling; but 3 Leon. 197. and 3 Cro. 102, *Stubs v. Rightwife*, and *Pas. 18 Car. 2 C. B. rot. 736.* are express, that the plaintiff ought to reply that special matter. Of which opinion was the whole court.

And

J. S. S. C. 1 Salk.
298.
5 Mod. 136.
145.
Carth. 363.
3 Danv. Ab.
414. p. 23.
Debt against
executrix,
defendant
pleads in
abatement,
that she is ad-
ministratrix.

A man shall
not traverse
that which is
not alleged in
the plaintiff's
declaration.

Doct. placit.
358.
Post. 122,
238.

Conclusion of
plea in abate-
ment.

Conclusion of
a plea to the
jurisdiction of
the court.

Nichols v.
Shepherd,
Skin. 620.

And *Holt* chief justice said, that if the defendant had taken such traverse, it had made her plea vitious; for it is enough for her to shew that the plaintiff's writ ought to abate; which she has done, in shewing that she is chargeable, only by another name. Then as to the traverse, that she did not administer as executrix before the letters of administration were granted, it would be to traverse what is not alledged in the plaintiff's declaration, which would be against a rule of law, that a man shall never traverse that which the plaintiff has not alledged in his declaration. Then Mr. *Dee* took exception to the conclusion of the plea, that it was not in abatement. Sir *Bartolomew Shower* *e contra* cited *Placit. gen. & spec. tit. Abatement* 20, 21. and argued, that if it had been only *petit judicium si ad billam praedictam sic ut praefertur formatam respondere debet*, it had been good enough. But the court denied those cases, and said, that in this present case it is a proper conclusion to the jurisdiction, which is sometimes also *si curia cognoscere velit*; but it cannot be good in abatement: And therefore judgment, that the defendant answer over. But a conclusion in abatement ought to pray judgment, *quod billa cassetur*. The same judgment was given for the same reason in this last point this term, between *Nichols* and *Shepherd*.

Stedman *vers.* Bates.

S. C. 1 Salk.
390.
5 Mod. 141.
Carth. 264.
Coparceners
shall join in
avowry.
12 Mod. 86.
Comb. 347.

Osmer v.
Sheafe, Lutw.
1210.

REplevin for the taking of bricks, &c. The defendant makes conusance as bailiff to the countess of *Salisbury*; and shews, that *John Bennet* was seised of the place where, &c. in fee; and being seised, demised to *John Griffith* for 180 years, rendring rent. That *John Bennet* died, by which the reversion descended to the countess of *Salisbury* and her sister Mrs. *Bennet*, daughters and heirs of the said *John Bennett*. And as bailiff to the countess he makes conusance for rent-arrear, &c. The plaintiff demurs. And *Hall* for the defendant says, that although the daughters were one heir to the father, yet they have several inheritances; and therefore it is not absolutely necessary for them to join in avowry. And he cited a case in point, *Trin. 4 & 5 Will. & Mar. C. B. rot. 707. Osmer vers. Sheafe*. But by *Rokeby* justice, this point was never moved in that case. And *Littleton* himself says, that coparceners ought to join in avowry. And therefore judgment for the plaintiff.

Memorandum, Sir John Powell, puisne baron of the Exchequer, was removed into the Common Pleas in the room of Sir Thomas Rokeby, removed into the King's Bench this term; and Sir Littleton Powis, puisne judge of Chester, was made baron of the Exchequer.

Drage *vers.* Netter. C. B.

CASE upon a bill of exchange. The defendant pleaded a re-Release.
lease after the bill drawn, and before the acceptance by the
defendant, the bill being drawn by J. S. upon the defendant. And Lit. sec. 446.
adjudged no plea, for this release was before the defendant was
chargeable. *Ex relatione m'ri Place.*

Rex *vers.* Kendal and Row. B. R.

S. C. 1 Salk.

347.

5 Mod. 78.

Skin. 596.

Commitment
for rescous of a
traytor ought
to specify, for
what treason
the traytor
was commit-
ted.

UPON a *habeas corpus* directed to the keeper of Newgate to
bring the bodies of the defendants to the King's Bench, he
returned, that the defendants were committed to his custody by
warrant of Mr. Secretary Trumball for high treason, in aiding and
assisting Sir James Montgomery to escape, who was committed to
the custody of a messenger for suspicion of high treason, &c.

To which return Mr. serjeant Levinz, Sir Bartholomew Shower,
&c. took exceptions, 1. That a secretary of state cannot commit.
1. Because no person can commit, who cannot administer an oath,
which a secretary cannot do. 2. There are no precedents of such
commitments. 3. In the parliament in 1678 it was looked upon
as an illegal practice of Sir Lionel Jenkins, and a great oppression
of the subject. 4. 1 *Andersf.* 297, 8. that persons committed by
one of the privy council ought not to be discharged, is an extra-
judicial opinion, and therefore not to be regarded. 2. It is so ge-
neral, that persons committed for the least offence by any of the
privy counsel shall not be dischargeable, which seems to be a
breach of the fundamentals of the common law, which support the
liberty of the subject. *Sed non allocatur.* * For by Holt chief ju-
stice, this point was looked upon to be so clear law, that it was
never drawn in question in his memory, but once by Sir Francis Win-
nington at the bar. And 1 *Andersf.* 297. is good authority, for it
was resolved at the meeting of the judges for asserting the liberty
of the subject. And 1 *Leon.* 71. takes a diversity; that if a man
be committed by one of the privy council, the cause of the com-
mitment ought to be specified; but if by the whole council, it
is not necessary; which was then looked upon as law, though it
is now altered by the *habeas corpus* act. And at common law,
before there were any justices of peace, there were commitments;
for the justices of gaol delivery ought to impanel a grand jury, to
inquire of all offenses committed by those in gaol; therefore there
must have been a commitment precedent. And by Rokeby justice,
commit-

See 3 Viner
515. p. 7. Sir
W. Wind-
ham's case
fully reported,
till fol. 554.
State Trials,
Vol. 4. 854.
Wilkes's case;
Easter 3 Geo.
3. in C. B. he
was commit-
ted by Secre-
tary of State's
warrant for
writing a sedi-
tious libel.
The court
discharged
him without
bail, he being
a member of
parliament.

* Secretaries
of state may
commit, &c.

31 Car. 2. c. 2.
Commitments
at common
law.

commitments by secretaries of state have been more than a hundred years ago. 2 Leon. 175. *Heyard's case*. And at common law conservators of the peace could not execute their office without a power to commit. And secretaries of state are of the same nature as conservators of the peace were. And no statute gives power to justices of peace to commit, but it is incident to their office.

Conservators of the peace may commit.
Secretaries of state are of the same nature with conservators of the peace. Commitment is incident to the office of a justice of peace.

Then the defendant's counsel took exception, that it appeared upon the return that Sir James Montgomery was committed to a messenger, which is an illegal commitment, for by the common law every person ought to be committed to the county gaol. Brit. 92. *Custum. de Normandy* 75. b. Hil. 25 Edw. 4. pl. 4. Besides that, to commit a man to a messenger, is to fine him before conviction, for he must pay the messenger's fees. And it is only an invention to evade the *habeas corpus* act. And if the commitment of Sir James Montgomery was not lawful, then it was no crime in the defendants to help him to escape. *Sed non allocatur*. For though generally commitments ought to be to the common gaols, yet it is a question, if commitment to another place than the common gaol will make the commitment void. Justices of peace ought not to commit to the *New Prison* for felonies, &c. However, though a messenger is not a gaoler, yet *per curiam* a man may be committed to a messenger for a time, till examination. But as this return was, the court said, they would intend, that this messenger was only appointed to convey Sir James Montgomery to prison; and therefore Sir James Montgomery was well committed in his custody. And by Holt chief justice it was ruled at *Norwich* assises, by Hale chief justice, that if a justice of peace directs a warrant to any particular private man, he may execute it and take the party, and may well justify the execution in an action of false imprisonment. And Holt chief justice said, that the *Tower* was looked upon by the law, and was, a prison within the *habeas corpus* act. *Gibbon's case*.

5 Hen. 4. c. 10.
2 Inst. 43.
Commitment to a messenger.
Justices of peace ought not to commit to *New Prison* for felonies. Post. 699.
A private man may execute a justice of peace's warrant.
Tower of London is a prison, *Gibbon's case*.

Then the defendants counsel argued, that the defendants could never be attainted in this case, because Sir James Montgomery the principal was dead before he was attainted. To which the attorney general Sir Thomas Trevor answered, that this was treason, and therefore all were principals, and consequently the defendants triable, whether Sir James Montgomery was attainted or not. See *Hale P. C.* 116. *contra*.

2. The defendants counsel said, that this was not treason but felony. Mr. Attorney *contra* cited *Hale P. C.* 109, 116. But to these two last exceptions the court gave no positive opinion. *Ideo quaere*. Lastly,

Lastly, The defendants counsel took exception to the return, that the treason for which Sir *James Montgomery* was committed, was not specified in the warrant of commitment. For perhaps Sir *James Montgomery's* treason might be such, as that the accessory to it should not be guilty of high treason. As if a man receive a counterfeiter of the great seal, knowing that he is a counterfeiter, &c. it is not treason. 12 Co. 81. Receiving of a coiner, knowing that he is such, is but misprision of treason. *Dier* 296, 298. But *Holt* chief justice said, that there was no authority, that a man who breaks prison, and lets out a coiner, is not a traitor. But he and all the court were of opinion, that supposing the crime to be high treason, two things should have been specified in the warrant of commitment. 1. For what treason Sir *James Montgomery* was committed, for he who breaks the prison is guilty of the specific treason. 2. It ought to have been averred, that Sir *James Montgomery* committed the fact, because the breaking of the prison is affected with the same offense. And therefore for this defect the prisoners were bailed.

If a man breaks prison, and lets out a coiner, it is treason. 2y.

Hilary

Hilary Term

7 Will. 3. B. R.

Wentworth *vers.* comitem Stafford.

S. C. 5 Mod.
147.
Amendment.
1 Salk. 52.
p. 16, 17.

SIR William Wentworth recovered judgment for 3000 l. against the earl of Stafford in 1676, and the entry of it was, that the plaintiff should recover 3000 l. *necnon* [blank] *pro damnis, &c.* And a motion was made for liberty to amend, and to insert a sum certain for the costs and damages, however small, to perfect the judgment. But after argument at the bar several times (by Holt chief justice) it cannot be granted, because it would be to give a new judgment, and besides, the motion comes too late. But Rokeby justice thought that it might be amended, because for a just debt. *Adjournatur.*

Hains *vers.* Jeffell.

S. C. 5 Mod.
168.
A man mar-
ries his sister's
bastard.
S. C. Comb.
356.
S. C. Comyns
2.

A Day was appointed to hear counsel, why a prohibition should not be granted to the spiritual court of Worcester, to stay a suit against Haines for marrying with the bastard daughter of his sister. And Sir Bartholomew Shower for the prohibition argued, that it was not prohibited by any law, for there was neither affinity nor consanguinity, for a bastard is *nullius filius*. *Co. Li.* 123, 157. It is no consideration to raise a use. *5 Co.* 65. *41 Ed.* 3. 19. *Old Bendl.* 102. *Dobbins e contra*, that the original is, *ad proximam sanguinis non accedat*; that the Jews made no difference, as to marriage, between bastards and others. *Seld. de jure Hebr.* li. 5. cap. 10. fol. 591. *Puffend.* li. 6. c. 1. par. 32. *Zepper*, li. 4. c. 19. p. 502. It seemed to the court that no prohibition should be granted; for though bastards are deprived of privileges by particular laws, the same reason prohibits them from marrying, as others. And it has been always held accordingly, especially where it is the child of a woman relation. And by Sir Bartholomew Shower's

Shower's rule Haines might marry his own bastard, which doubtless could not be allowed. Adjournatur.

Memorandum, Sir William Williams and Sir William Whitlock were turned out from being King's council.

Bovey vers. Castleman.

Indebitatus assumpsit. The plaintiff declares, that there was an *Indebitatus assumpsit* agreement between the defendant and him, that if the duke of *Savoy* made an incursion into *Dauphinee* within such a time, that then the plaintiff should give the defendant 100 l. And if the duke did not make the incursion into *Dauphinee* within the time limited, that then the defendant should give to the plaintiff 100 l. which agreement was reduced into writing, and signed by both the parties: and the plaintiff avers, that the duke of *Savoy* did not make any incursion into *Dauphinee* within the time limited; by which the defendant became indebted to the plaintiff in 100 l. and being indebted assumed to pay, &c. Upon *non assumpsit* pleaded, verdict for the plaintiff. And now Mr. *Northey* moved in arrest of judgment, that there was not any consideration to raise a debt, for no debt can arise between the plaintiff and defendant upon the incursion of the duke. For it is but a wager, for which *indebitatus assumpsit* will not lie, because there wants a real consideration. But for mutual promises *assumpsit* may lie, but not *indebitatus assumpsit*. For *indebitatus assumpsit* will lie only in cases where debt will lie, but in this case debt cannot lie. *Quod fuit concessum per totam curiam.* And therefore judgment was given, *quod querens nil capiat per billam.*

Indebitatus assumpsit lies not for a wager.
1 Salk. 23.
5 Mod. 13.
Comb. 303.
Lev. 113.
12 Mod. 69.
Keb. 599.
600, 635.
Sid. 160.
Mo. 667.
4 Rep. 94.
6 Mod. 129.
Vent. 268.
Skin. 196.

Fletcher vers. Ingram.

Intr. Mich. 7 Will. 3. B. R. Rot. 107.

Replevin. The defendant saith, that the place where, &c. is in *Chenfon*, and that *Chenfon* is parcel of the manor of *Chenfon*, of which manor J. S. is seised in fee; and prescribes to have a court-leet of all the inhabitants within the said manor; that there is, and time whereof, &c. hath been, a custom within the said manor, that the homage of the leet has used to elect a constable, at the leet held within the month of St. Michael, out of the inhabitants of the manor, to be constable of *Chenfon* for one year; that the person so elected hath used to take an oath to execute the said office; or in case of failure, that the steward of the court used

S. C. 1 Salk. 175.
5 Mod. 124.
Skin. 635.
669.
Lilly Entr. 369.
11 Mod. 215.
12 Mod. 88.
180, 115.
2 Jones 212.
Comb. 351.
2 Salk. 502.
Barnardist. to 51.

to impose a reasonable fine. That the plaintiff being an inhabitant within the manor was elected by the homage according to the custom, to be constable for one year then next following, *unde notitiam habuit*: And because the plaintiff refused to take the oath, the steward imposed 40 s. fine upon him: and because the fine was not paid, the defendant makes conusance of the taking of the cattle as a distress in the place where, &c. as bailiff to J. S. The plaintiff demurs. And serjeant Wright for the plaintiff took exception.

1. That the custom was void for the uncertainty, for it is not shewn, for what year the person elected ought to serve, for the custom is, to serve one year generally. 2. Admit that the custom is good, then it is not pursued, for the plaintiff was elected to serve the year next ensuing. *Sed non allocatur*; for, by the court, it shall be intended, that the custom is, to serve the year next ensuing. And Sir Bartholomew Shower cited a case between Titus and Perkins since the revolution, in which Holt chief justice held, that a custom, that a copyholder shall pay the profit of one year generally for a fine for admittance, was good, without alleging what year.

Custom that a constable elected by the homage shall serve for a year is good, and shall be intended for the year next ensuing.

3 Mod. 132.
Titus v. Perkins.

Custom to pay the profit of a year for a fine, good, without saying what year.

The second exception was that the custom is void, because it is, that the party elected should take an oath, to execute the office, &c. But in the custom no person is named, who ought to administer the oath; and it is not in the power of the party to take the oath, without the concurrence of some person to administer it. And in 8 Co. 38. b. Griesly's case, it is pleaded, that the person ought to take the oath before the steward in court. *Sed*

By common law the homage elects the constable.

The steward shall set a fine without custom on him who refuses to serve, if he be in court.

If he be absent, he shall be presented and amerced.

The steward of a leet may administer an oath to a man elected con-

stable by the homage, being present in court. If he is not present, the steward shall issue a precept, to command him to swear before the justices of peace.

non allocatur. For, by the court, of common right the homage in courts leet shall elect the constable, and this is the constant practice in *Middlesex*. Then the steward by consequence of law may set a fine upon the party elected, if he refuse to serve, though no custom is alleged for the fine. But this supposes the party present in court. When he is not present in court, the steward cannot set a fine, but his refusal ought to be presented by the homage at the next court, and then he shall be amerced. In the same manner if the person is present in court, the steward *ex officio* may administer the oath; but if the court is adjourned before the oath taken, the steward ought to issue a precept, to command the party, to take the oath before the justices of peace. For though justices of peace had their beginning within time of memory, yet they have the same authority, as the conservators of the peace had at common law, who in such case might have administered the oath.

The

The third exception was, that the defendant should have alleged a custom for the taking of the distress. Of which opinion was the whole court.

If a man lays a custom for a fine, he ought to lay also a custom for a distress for it.

The fourth exception was, that the general averment, that the plaintiff *inde notitiam habuit*, is not sufficient, but the plaintiff ought to have had special notice, and this ought to have appeared in the pleading. Of which opinion was the whole court also. And for these two last reasons judgment was given for the plaintiff. See *Winch. Ent.* 986.

A man elected constable shall not incur a penalty, before notice, for not serving.

Walter *vers.* Stokoe.

Judgment in trespass was given against five. Four bring error, and adjudged that the writ was not good. For all persons against whom a joint judgment is given, ought to join in a writ of error: But it appears here upon the face of the writ, that there was another person, against whom the judgment was given, who has not joined in the writ of error, and it is not alleged that he is dead, and therefore the writ is bad. 2. It was adjudged, that although the curfiter had right instructions, yet this writ of error is not amendable by common law, nor by any of the statutes. For all amendments are granted for the support of judgments, but the principal design of a writ of error is to reverse them. 3. It was adjudged, that if the writ of error had been amendable, yet the plaintiff in error should not be obliged to amend his writ at the defendant's motion (for in this case Mr. Northey for the defendant in error moved that the plaintiff should amend his writ) for a man cannot oblige another to sue a writ, in other manner than he himself intends. See 1 *Leon.* 134. And *Holt* chief justice said, that the defendant in error is scarce party in court; for if he dies after *in nullo est erratum* pleaded, the court shall proceed; but if the plaintiff dies, it is otherwise. See 1 *Ventr.* 34. And for these reasons the writ of error was quashed. See *Yelv.* 52. *Jones* 406. 1 *Rol. Abr.* 418. pl. 13. *Rast. Ent.* 301. 1 *Sid.* 216, 429.

S. C. 5 Mod. 16, 69.

Carth. 367.

Judgment a-

gainst five,

four bring er-

ror, the writ

shall abate.

Writ of error

not amenda-

ble.

Nota; a writ

of error is now

amendable by

the stat. 5 Geo.

1. cap. 13.

sec. 1.

Post. 564.

Defendant

cannot compel

the plaintiff to

amend his

writ.

Dominus

Dominus Gerrard *vers.* Dominam Gerrard,

Error. C. B.

S. C. 3 Lev.
401.

Lev. Ent. 76.

1 Salk. 253.

Salk. 592.

3 Mod. 65.

What shall be

called *caput**baroniae*, to

bar dower.

Comb. 352.

1 Salk. 54.

DOWER. As to part the tenant confesses the action, and judgment is given in C. B. for the demandant, and *miseri-*
cordia entred against the tenant. And as to the residue, the tenant
 pleads, that Sir Thomas Gerrard was seised of the mesuage now in
 demand, called Bromley, in his demesne as of fee. And being so
 seised, King James the First, by his letters patent under the great
 seal of England, created the said Sir Thomas Gerrard baron of
 Bromley; and so the mesuage in demand became *caput baroniae*;
 and he prays judgment, if the demandant ought to be endowed
 thereof. The demandant demurred: And judgment was given for
 her in C. B. and another *miseriordia* entred against the tenant;
 who now brings error, and assigns for error, 1. That the de-
 mandant ought not to have dower of this mesuage, being *caput*
baroniae. 2. That there ought not to be two *miseriordia*'s against
 the tenant. And Sir Bartholomew Shower and Mr. Acherley ar-
 gued, as to the first point, that it would tend to the dishonour of
 the dignity, to have the capital mesuage divided and dismembred;
 but it would be more for the honour of the realm, that it be kept
 intire. And for authority cited Co. Li. 31. b. Fitzb. Dower, 180.
 Braet. li. 2. 170. b. Pasf. 4 Hen. 3. rot. 7. But serjeant Wright
 and Mr. Northey *contra*; of which opinion was the whole court.
 For these authorities must be intended of feodal baronies, of which
 there are none at this day, except Arundel. And this privilege was
 allowed to them, because they ought upon necessity to defend the
 realm, to which they were bound by tenure: For the King at the
 creation of the barony gave to the baron lands and rents, to hold
 of him by the defense of the realm. But then this cannot be a
 feodal barony, for it was in the seisin of the Gerrards before, and
 therefore was not given to the Gerrards by the King, at the crea-
 tion of the barony, to hold of him. And Rokeby justice said,
 that this was the reason of the judgment in the Common Pleas.
 As to the second point, the council for the plaintiff in error said,
 that it is a rule in law, *quod nemo bis punitur pro uno delicto*; but
 if two amercements be allowed here, this rule will be broken.
 And for authority they relied on 5 Co. 57. Specot's case, and the
 rule taken in Peytoe's case, which has not been yet denied. 2 Book
 of judgments 102. Serjeant Wright and Mr. Northey *contra*, That
 there were two offences, and therefore there ought to be two
 amercements; for the tenant has delayed the demandant two se-
 veral times, and then there being two several judgments, he must
 be

Feodal baro-
nies, what

Ante 31.

Two amerce-
ments upon
one writ.

be twice amerced. 2 Leon. pl. 231. 1 Roll. Abr. 213, 218. Barry's case. Fitzb. Judgment 32. Rast. Entr. 19. Co. Entr. 169. b. And Specot's case is not against it, because the second judgment there was erroneous, for there was no delay there in the defendant. And Brook Amercement 16, 17, 56, insinuates, that where there is a final judgment given, there must be a *misericordia*. And then when there is a new delay, and a new judgment, there must be another *misericordia*. And *per curiam*, the question will only be, whether a man can be twice amerced upon one writ? And adjudged that he may in this case. For when the tenant confesses part, judgment must be entred against him, which is a final judgment; then there must be an amercement, or it will be error: Then at present it is a question, whether the last judgment shall be for or against the demandant? But in the mean while the demandant is delayed; therefore when judgment is afterwards given for the demandant, there must be a new amercement: But where one judgment depends upon the other, and is but an interlocutory judgment, the law is otherwise. And judgment, for these reasons, was affirmed by the whole court.

Chamberlain *vers.* Hewitson.

THE plaintiff *Chamberlain* moved for a prohibition to the spiritual court, upon a suggestion, that the defendant *Hewitson* preferred articles in the spiritual court against her for incontinency with the husband of *Hewitson*, and obtained sentence against her. Upon which Mrs. *Chamberlain* appealed to the court of delegates, who confirmed the former sentence, and made a decree, that the plaintiff should do penance, and pay costs to Mrs. *Hewitson*. Afterwards the general pardon issued, by which the penance was pardoned. And now the defendant *Hewitson* libelled in the spiritual court for the costs; where the plaintiff Mrs. *Chamberlain* pleaded the release of the husband of Mrs. *Hewitson*, which the spiritual court disallowed; and therefore she prayed to have a prohibition granted. And serjeant *Wright* for the defendant argued against the prohibition, that *ubi cognitio principalis, ibi debet esse cognitio accessorii*. To prove which rule, and apply it to the present case, he cited *Yelv. 173. Starkey vers. Barton & Gore. March 73. p. 112. 2 Cro. 269. Robert's case*. A feoffment was tried in the spiritual court in a case between *Tutter and Whiskins*. 2. He argued, that it were in vain for any wife to commence a suit against the adulterers, if this release should be allowed to bar her of her costs, which are merely the charges of the suit, by which she has brought the criminal to condign punishment; therefore these costs ought not to be releaseable by the husband, no

S. C. 12 Mod. 891.

Ro. Abr. 301.

Motam and

Motam.

S. C. 1 Salk:

115.

5 Mod. 69.

Feme covert

libels in the

spiritual court

against A. for

costs recover-

ed against her.

A. pleads a

release of the

husband.

If the spiritual

court does not

allow this,

a prohibition

shall be grant-

ed Otherwise

if the husband

and wife had

been divorced.

*Ubi cognitio**principalis, ibi**et accessorii.*

12 Co. 65.

1 R. 3. 4.

Reg. 57.

Cro. Eliz.

466, 788.

2 Lev. 64.

3 Lev. 72.

U

more

Spiritual court
may deter-
mine feoff-
ments, &c.

Costs are given
to the wife in
the spiritual
court. The
husband dies.
The executor
of the husband
shall not have
them, but
the wife.
See Cro. Car.
16. Green's
case.

more than the case of *Motam*, 1 *Roll. Rep.* 426. 2 *Roll. Abr.* 298. p. 1, 300. pl. 10. Against which it was argued for the plaintiff by Sir *Bartholomew Shower*, that the prohibition ought to be granted; and of that opinion was the whole court. And resolved, 1. That the jurisdiction of the ecclesiastical court shall extend to the determination of the validity of letters patent, feoffments, releases, &c. which come in question there, in matter properly within the ecclesiastical consueance, provided that in the determination of such collateral matters they do not deviate from the rules of the common law; for if they do so, a prohibition shall be granted. 2. It was resolved, that if a *feme covert* sue another in the spiritual court for incontinency with her husband, and recover costs, if the husband release them, the wife is barred. For since the husband is liable to the charges of the suit expended by the wife, he shall have the costs in recompense; besides that, the wife cannot have a chattel interest exclusive of the husband. But if the husband dies, the wife shall have them, because they were a *chose in action*, and they shall not go to the executors of the husband. But if the husband and wife are divorced *a mensa et thoro*, and the wife has alimony allowed her, and she sues for defamation or other injury, and recovers costs, the husband releases them, yet the wife shall recover them; because they come instead of that which she has expended out of her alimony, which was a separate maintenance, and not in the power of the husband. And this is the reason of *Motam's* case. But if the wife has a legacy left her, the husband may release it. 2 *Roll. Abr.* 301. pl. 2. In the principal case a prohibition was granted.

Easter

Easter Term

8 Will. 3: C. B.

Sir George Treby *Chief Justice.*

Sir Edward Nevill

Sir John Powell

Sir John Powell of Gloucester

} *Justices.*

Lawton *vers.* Ward.

ACTION upon the case for spoiling his way with carts S. C. 1 Lutw. and carriages. The plaintiff declares, that he was seised ^{111.} of a close called *L.* and of another close called *B.* continuously adjoining, and that he and all those, &c. time whereof, &c. had a cart way from the high road between *F.* and *W.* to *L.* *tanquam ad tenement. spectantem*, and that the defendant *cum carucis et carriagiis suis* had made the way so foundurous, &c. *ad damnum, &c.* The defendant pleads, that *W. W.* was seised in fee of a close called *C.* and that he and all those, &c. time whereof, &c. had a way in the same way to his close of *C.* and the defendant drove the carts, &c. as servant to *W.* to the close called *C.* &c. The plaintiff replies, and confesses the prescription of the defendant, &c. but says, that he drove the carts to *C.* and also farther to *D.* &c. The defendant rejoins, that forasmuch as the plaintiff has confessed, that the way did not belong only to him, but also to *W.* his master, he might use it as he pleased, &c. The plaintiff demurs. And adjudged for him by the whole court. And resolved, 1. That the defendant has not pursued his prescription; for the prescription is to go to *C.* then when he goes to *C.* and farther to *D.* he has not authority to do it. And *Powell justice junior* said, that the difference is, where he goes farther to a mill or a bridge, there it may be good; but when he goes to his own close it is not good. For by the same reason, if the defendant purchases a thousand closes, he may go to them all, which would

If a man prescribes for a way to go from *A.* to *B.* and he goes from *A.* to *B.* and farther to *C.* which is his close, it is ill. But *contra*, if he goes to the mill, &c. after he arrives at *B.* *Post. 121.*

In case the plaintiff may reply, as well as shew all the fact in his declaration. Yelv. 13. Wood vers. Hawkhead. Cro. Car. 257. Butler v. president of college de physicians. 1 Salk. 221. Lit. Rep. 215. Yelv. 13. Co. Lit. 304. Trespass with the defendant's cattle, he justifies with cattle of his master, good. Hil. 1 Edw. 3. 5. 6. p. 40. *Tanquam ad tenement. spectantem* rejected as surplusage.

be very prejudicial to the plaintiff. And for authorities they relied upon 1 *Rolls Abr.* 391. pl. 3. 1 *Mod.* 190. 3 *Keb.* 348. 2. Resolved, that the replication is no departure from the declaration, but fortifies it; and the plaintiff in an action upon the case (notwithstanding that it is supposed, that he sets forth his whole case in his declaration) may aid himself by a replication, as well as in any other actions. For the plaintiff cannot divine, that the defendant will prescribe for the same way. And *Powell junior* justice compared it to the case, where the plaintiff brings trespass for a horse, the defendant claims it as a stray, the plaintiff may well reply, that the defendant rode or wrought the horse; and this fortifies the declaration, for by this the defendant abused his right, and is thereby become a trespasser *ab initio*. Yelv. 96. *Bagshaw vers. Gaward*, 2 *Cro.* 147. 3. Resolved, that the plea is good enough, notwithstanding that the plaintiff charges the defendant with spoiling the way with *carucis*, &c. *suis*, and the defendant justifies as servant with the *carucis*, &c. of his master, because the defendant had a property in them by the possession. 4. Resolved, that the prescription, as the plaintiff has laid it, is good; for though he says, that he was seised of two closes contiguously adjoining, and then lays the prescription for the way to one of them, *tanquam ad tenement. spectantem*, and has not shewn, that he was seised of any tenement before; the court said, that they would reject *tanquam ad tenement. spectantem* as surplusage. And in *Rastall* it is often omitted. *Rast. Ent.* 618.

Tukely vers. Hawkins.

1 *Ro. Abr.* (F.) p. 3. 4 *Rep.* 30 b. 1 *Leon.* 227. *Godb.* 142. *Post* 159.

IN ejectment, upon motion for a new trial, resolved, that a steward of a manor may take a surrender of a copyhold, out of the manor; but cannot admit out of the manor; and that a custom, that the steward shall not take surrenders out of the manor, is a void custom.

Kempster vers. Deacon.

S. C. Salk. 665. In trespass where the view is granted, the plaintiff shall have full costs, tho' the jury gives but 10s. damages.

TRESPASS for a close broken, &c. Upon not guilty pleaded the *nisi prius* roll was carried to the assises to be tried, and there by consent of the parties the jury had the view, and the trial was put off to the next assises, and then the issue was tried, and a verdict for the plaintiff and 10s. damages. And the question was in *C. B.* whether the plaintiff should have more costs than damages, for the judge had made no certificate that the title came in question. And resolved *per curiam*, the

the plaintiff shall have full costs; for it appears upon the record, that the view was granted, but the view cannot be granted unless where the title comes in question. And therefore the granting of the view amounts to a certificate, that the title came in question. And by all the prothonotaries, it is always the practice, to give full costs where the view is granted.

Dalston vers. Reeve.

Covenant upon indenture, for non-payment of rent. The Co. Lit. 319. plaintiff declares, that he was seised of tithes, and by indenture demised them to the defendant, rendering rent, and the defendant covenanted to pay it, and he assigned his breach in non-payment of so much. And the defendant pleaded eviction. The plaintiff demurred. And judgment was given for the defendant; because it is a rent, and the eviction is a suspension of it, and therefore a good plea. *Ex relatione m'ri Mather.* 2. Ro. Abr. 940.

Chance vers. Adams.

DEBT for 200*l.* The plaintiff declares, that whereas by an act for granting several rates upon tonnage of ships and vessels it is enacted, that if any gauger gauge any fat, &c. of beer, ale, &c. and do not leave a true note in writing of the last gauges taken, with the brewer, &c. containing the true quantity and quality of the liquors gauged, he shall forfeit 5*l.* for every offense; then the plaintiff shews, that the defendant was a gauger, and that the 7 Nov. 5 Will. & Mar. he gauged divers vessels of the plaintiff of exciseable liquors, &c. and did not leave a note in writing, &c. and that *diversis temporibus* after the 7th of Nov. and before the bringing of the action, he gauged several vessels of the plaintiff and five other persons, of exciseable liquors, and did not leave a note in writing, &c. *contra formam statuti, unde actio accrevit* to the plaintiff to demand 200*l.* the forfeitures amounting to so much at five pounds a time. The defendant demurred. And it was objected on the part of the defendant, that the plaintiff has mistaken the act, for the act is for tonnage of ships, but the plaintiff has declared upon the act, which was to grant several rates for tonnage and ships, but there is no such act; then the plaintiff restraining himself by a *contra formam statuti*, when there is no such act, the declaration is ill. Hutt. 56. Parker's case. *Sed non allocatur.* For the title of the act is no part of the act, and therefore it is but surplusage, and misrecital shall not vitiate. Hardr. 324. in the case of the Attorney general vers. Hutchinson & Pocock, by Hale chief baron. Misrecital of the title of an act does not vitiate.

Darwyn vers.
comit. Mon-
mouth.

Acts were not
titled before
11 Hen. 7.

And *Powell senior* justice said, that it was so adjudged in the house of peers between *Darwyn* and the earl of *Monmouth*. And by *Treby* chief justice the title of the act is but a new usage, and begun about 11 *Hen. 7.* but the misrecital of the purview or enacting part always vitiates.

*Diversis tem-
poribus* too
general and
uncertain.
Post.

The second exception was, that the plaintiff ought to have said, *postea, viz.* such a day the defendant gauged, &c. and ought not to have said so generally, *diversis temporibus*, &c. And of this opinion was the whole court. For the proof is incumbent upon the defendant, that he has left a note, &c. But it is impossible for him to provide witnesses to answer the plaintiff's charge, if he does not know at what days the plaintiff will charge him. See 2 *Roll. Abr.* 81. *Ashton's case*, pl. 15.

Divers excise-
able liquors,
and does not
say what.

The third exception was, that he has said divers exciseable liquors, which is too general, for he should have specified what liquors, to the end that the court might have judged, whether they were exciseable or not; of which opinion the whole court was, and therefore judgment was given for the defendant.

Carth. 232.
Comb. 194.
Sho. 353.
12 *Mod.* 27.

Where all the
penalty is gi-
ven to the in-
former, he is
not bound by
31 *Eliz. cap.* 5.
Culliford vers.
Blandford.
4 *Mod.* 129.

Another exception was taken, that it appears upon the plaintiff's declaration, that he has mistaken his time; for it appears, that a year was expired after the fact committed, before the bringing of this action; and therefore it is barred by 31 *Eliz. cap.* 5. But as to that *Nevil* and *Powel senior*, justices, relied upon a case between *Culliford* and *Blandford* adjudged since the revolution; where an action *qui tam*, &c. by bill was brought in *B. R.* for having made a false return of a burgess to serve in parliament; the false return was laid to be in *March* 1689, and the bill was filed *term. paschae* 1690, so that it appeared upon the record, that more than a year was elapsed; and upon error brought in the exchequer chamber it was resolved by the majority of the judges then present there, that where the informer ought to have the whole penalty, the statute of 31 *Eliz.* does not extend to it, because it is not within the words of the act, and penal acts are not extendible by equity. But *Treby* chief justice, and *Powell junior* justice, were of opinion contrary to that judgment; for if the informer should be bound, when the Queen was joined with him, much more should he be bound when he sued by himself.

Note, *Treby* chief justice, *Rokeby* justice of *C. B.* and *Powell*, bar. held, that for the said reason the judgment in the case of *Culliford* and *Blandford* ought to be reversed; but *Nevill* and *Powell* justices of *C. B.* and *Lechmere* and *Nevill* barons held the contrary.

Burghill *vers.* Archiep. Ebor. Episcop. Carliol. Gibbons
& universitat. Cantabr.

Burghill brought a *quare impedit* against the defendants. The writ was returnable *tres Mich. 5 Will. & Mar.* at which day the defendant Gibbons cast an effoin, which was not adjourned. Then the archbishop of York cast an effoin, which was not adjourned. Upon which the defendants entred a *non prof.* against the plaintiff, which upon motion in Hilary term last was set aside, because the effoin of the archbishop of York, for the non-adjournment of which the plaintiff was nonsuit, was ill cast, the effoin of Gibbons not being adjourned, so that the archbishop had no day in court to cast an effoin; upon the setting aside of which *non prof.* the record was made right, and the proceeding was in this manner, *viz.* the writ was returnable *tres Mich. 5 Will. & Mar.* at which time Gibbons was effoined, which was adjourned to *crast. Martin.* then the archbishop cast an effoin, which was adjourned to *octab. Hilar.* and at *octab. Hilar.* the two other defendants were not effoined but made default; then the plaintiff sues a *pone* against them, to shew cause why they made default, returnable *octabis purificationis*, at which day issued an *alias pone*, which was continued until the first return of last Hilary term; at which day the bishop of Carlisle cast an effoin, which was adjourned to *quinden. paschae*; at which day the university cast an effoin, to which the plaintiff entred a challenge upon the effoin roll, and the defendant demurred to the challenge, and the effoin was quashed by the court, because an effoin is an excuse of the appearance of the party, now a corporation cannot appear, and therefore cannot cast an effoin, nor enter into recognizance. *Bendl. 121. 21 Edw. 4. 79.* And now serjeant Gould moved, that the archbishop of York might have an effoin, his former effoin which he cast being adjudged ill upon the setting aside of the *non prof.* and so he had not had any effoin. And *per curiam*, he shall have an effoin, for the course of the court is, that an effoin may be cast at any time before a *ne recipiatur* is entred; and the reason of the irregularity of the first effoin of the archbishop (which was set aside for that cause) proceeded from the plaintiff's own fault, *viz.* the non-adjournment of the effoin of Gibbons, upon which he might have been nonsuit; but where there are several defendants, and one of them casts an effoin, which is challenged, and upon demurrer the challenge is allowed; the others have no day in court to cast an effoin, because *idem dies datus est* to them all, but all the defendants may join in effoin if they please, or any two defendants, one casts an effoin which is challenged, and the challenge allowed, the others have no day in court to cast effoin. All the defendants may join in effoin or sever.

If there are three defendants, and one casts an effoin which is not adjourned, the others have no day in court to cast an effoin.

Corporation cannot cast an effoin, nor enter into recognizance.

Mo. 68.

Effoin may be cast at any time before a *ne recipiatur* entred.

If the plaintiff does not adjourn an effoin cast by the defendant, he may be nonsuit.

Three defendants, one casts an effoin which is challenged, and the challenge allowed, the others have no day in court to cast effoin.

of

The allowing of them may have several effoins. And by *Powell junior* justice it is not error, to allow an effoin where it does not lie, but it is error to deny an effoin where it does lie; and (by him) it is not error to allow two effoins. But *Powell senior* justice seemed to doubt of this latter point, because it is within the act of fourching by effoins. And *Powell junior* justice cited the case of one *Slay*, where an effoin was cast for the defendant at *nisi prius*, which the plaintiff challenged, because an attorney was entred upon record, and the challenge was allowed, and judgment peremptory was given, and upon error brought it was affirmed in *B. R.* because it was in nature of a departure in despite of the court; which case, as well all the court, as the serjeants at the bar remembred.

Slay's case. Good cause to quash an effoin, for that an attorney is entred of record.

Judgment final given upon quashing an effoin.

Hil. 1 Ed. 3. fol. 2.^r pl. 2.

Mackareth *vers.* Pollard.

TRESPASS for the taking of a horse. The defendant justifies under a judgment recovered against the plaintiff in the hundred court, by a *taliter processum*, and does not set out the proceedings at large; and adjudged good, notwithstanding that the old books are to the contrary, upon the authority of a case between *Doe* and *Parmiter*, Hil. 24 & 25 Car. 2. adjudged in point in *B. R.* in the time of lord *Hale*, upon great debate. The same point adjudged between *Walker* and *Freby* and *Holmes*, Trin. 8 Will. 3. C. B. Intr. Hil. 7 Will. 3. C. B. Rot. 342.

2 Lev. 85.
2 Danv.
Ab. 297. p. 5.
Walker v. Freby and Holmes.
2 Lev. 81.
3 Lev. 403.
2 Mod. 102. Ibid. 195. S. P. Murray v. Wilson in B. R. Hil. 25 Geo. 2. *ex relatione* serjeant Wilson.

Knight and his wife *against* The mayor, masters, and burgesses of Wells.

S. C. Lutw.
508, 519.
Name of corporation.

DEBT upon a bond made to the plaintiff's wife *dum sola* by the corporation of *Wells*, by the name of *The mayor, aldermen, and burgesses*. Upon *non est factum* pleaded the jury find a special verdict, that *Queen Elizabeth* in the thirty-first year of her reign created them a corporation by the name of *The mayor, masters, and burgesses of Wells*, and that *King Charles II.* in the thirty-fifth of his reign, by his letters patent, granted to them, that they should be known by the name of *The mayor, aldermen, and burgesses, &c.* and by this last name they entred into the bond; and if this be the bond of the mayor, masters, and burgesses, of *Wells*, then, &c. And adjudged for the defendants, because by the taking of the second letters patent the first name is intirely extinguished, but it was agreed that a corporation might have

have two names, the one by prescription and the other by grant, or both by prescription, but not two by grant. *Hardr. 504.*
The attorney general against the town of *Farnham*.

Pedro vers. Barrett.

A Brought case against *B.* for falsely and maliciously procuring him to be indicted, for conspiring to lay a bastard child to *B.* of which indictment upon trial *A.* was acquitted. After verdict for the plaintiff upon not guilty pleaded, adjudged that the action well lay, for the conspiracy was a thing punishable at common law by fine and imprisonment, &c.

Y

Trin.

Trinity Term

8 Will. 3. C. B. 1696.

Sir George Treby Chief Justice.

Sir Edward Nevill

Sir John Powell

Sir John Powell of Gloucester } *Justices.*

S. C. Lutw.
364.

Sir John Brownlow against Sir John Hewley.

Intr. Hil. 7 Will. 3. C. B. Rot. 1657.

Debt for rent
against as-
signee of a
term, the
plaintiff counts
upon a general
possessionatus,
without shew-
ing the be-
ginning.

D E B T for 550*l.* for rent. The plaintiff declares, that *Sir Thomas Trevor* and *Sir John Walter* were possessed of a farm for a term of 99 years, commencing the first of *April 14 Jac. 1.* and that they being so possessed, assigned all their interest in the term to *J. L.* rendering 100*l.* per annum rent; and that *J. L.* entred and was possessed, and paid the rent; that afterwards *Sir John Walter* and *Sir Thomas Trevor* granted the rent to *Richard Brownlow* for the whole term, to which grant *J. L.* attorned; that *Richard Brownlow* made *Sir John Brownlow* his executor, and died; and that *Sir John Brownlow* made the now plaintiff his executor and died; both of whom proved the respective wills; and the plaintiff brings debt against the defendant *Sir John Hewley*, as assignee of *J. L.* of the land, for 550*l.* for rent, for five years and a half, &c. The defendant pleads tender of 50*l.* every day of the half year at which the rent was payable, and that no person was there to receive it, and that it was never after demanded upon the land. The plaintiff demurs. And resolved, 1. That this is a rent arising by real contract, and is reservable without deed, and that debt well lies for the assignee of it. And the court relied principally upon the case of *Winton vers. Pinkney*, 1 *Ventr.* 242, 272. 3 *Keb.* 131, 137. *Raym.* 11. *Robins* B. attorns. B. assigns the land to D. C. brings debt for the rent against D. 2 *Lev.* 80. *Ray.* 222. 2 *Mod.* 175.

A. possessed of
a term assigns
it to B. ren-
dring rent.
A. assigns the
rent to C. B.
Ray. 222. 2 *Mod.* 175.

vers.

vers. Con and Warwick. 2 *Jones* 1. *Goodman vers. Packer.* And (by them) the opinion of *Hale, Allen* 57, 8. hath been held for law all these last years. 2. It was resolved, that the defendant should have pleaded with a *proferit in curia*; and therefore judgment was given for the plaintiff.

If a man pleads a tender in debt for rent, he ought also to plead

it with *proferit in curia*. Raym. 418. *Crouch v. Falstaff.*

Allways vers. Broom.

Parco fracto and *rescous* may be joined. Adjudged Trin. S. C. Lutw. 1259.
8 Will. 3. C. B. *Tbel. Dig.* 107. lib. 10. cap. 15. f. 17.

Ward vers. Griffith.

SIR Edward Ward in 1683 brought an action against Sir William Warren, in which Griffith was bail, and obtained judgment. Sir William Warren rendered himself to the Fleet, and redidit se in discharge of his bail was entred in the warden of the Fleet's book, but no committitur was entred in the office. Sir William Warren continued prisoner in the Fleet till Michaelmas term last, and then died there. Sir Edward Ward died, and W. his executor, now plaintiff, brought debt upon the recognizance against the bail; and in Easter term now past serjeants Pemberton, Levinz and Wright, moved for an imparlance, 1. Because debt does not lie upon the recognizance. Raym. 14. *Godlington vers. Lee.* 2. Because the plaintiff has slept so long as thirteen years. 3. They prayed that the court would give them leave to enter a committitur in the office. But this second was denied, because it is now too late after the death of the party. And as to the first, Treby chief justice and Powell junior justice were clear, that debt lies, and that the defendant shall have liberty to plead all pleas, that he might have pleaded upon a *scire facias*. And for this they relied upon the case of *Sparrow and Sowgate, W. Jones* 29. 1 *Rolls Abr.* 600. p. 7, 8. But they said, that such actions were discountenanced, and therefore if no *capias ad satisfaciendum* is filed against the principal, they would make a rule of court that it should not be filed after, which would stop the action; and Powell justice junior said, that the King's Bench did so in the case of *Miles and Bateman*, 3 *Keb.* 734. as Powell remembered. But because the plaintiff had staid without suit so long, they granted an imparlance until this term, being Trinity term. And now Pemberton moved, that because the plaintiff had declared generally upon a recognizance, so that the condition does not appear, and the defendant cannot plead no *capias ad satisfaciendum* against the principal, &c. that the

Debt lies against bail upon recognizance.

Committitur cannot be entred after the death of the prisoner, though he was in prison in his life time, &c. Ashton's Entr. 226. 3 Brownl. 176. The court makes a rule, that no *ca. sa.* shall be filed against the principal after his death.

Oyer of a
bond or re-
cognizance
granted the
same term.

Of other re-
cords at any
time.

Failure of re-
cord.

the court will grant him *oyer* of the recognizance. And *per curiam*, if a bond is brought into court, *oyer* is grantable only the first term, for afterwards it is adjudged in the possession of the party. The same law of a recognizance, which is a pocket record. 3 Keb. 76. *Downs vers. Duckworth*. But of other records, which are always in court, *oyer* is grantable at any time. And therefore in this case the declaration being delivered two terms before, and the time elapsed to have *oyer* of course, the court granted *oyer*, because otherwise the defendant would be ousted of his plea, the recognizances by bail in C. B. being specially entred, the plaintiff has declared here as upon a general recognizance, and omitted all the special matter. But by *Powell junior* justice, if the defendant had here pleaded *nul tiel record*, the issue had been with him; for a record which comprises that upon which the plaintiff declares and more, is not the same record with that upon which the plaintiff declares.

Hatter vers. Ash.

S. C. 2 Salk.
413.

3 Lev. 438.

Lease to com-

mence a *datu*

includes the

day of the

date.

Mo. 637.

759, 626.

Palm. 30.

3 Lev. 438.

Salk. 413.

1 Roll. Rep.

229.

Hob. 314.

2 Bull. 304.

5, &c.

Co. Lit. 52.

b. 48. b.

Ro. Rep. 402.

Cro. Jac. 153.

563.

Perk. Sec.

187.

1 Ro. Abr.

828.

Hob. 314.

margin.

3 Rep. 55.

UPON a special verdict in ejectment the case was thus. A prebendary made a lease of lands by indenture the fourteenth day of April 167. *habendum a datu indenturae* for three lives, and livery was made the fourteenth. And it was objected against this lease, that a *habendum a datu* is all one with a *habendum a die datis*, which is exclusive of the day of the date; and then the lease will begin the fifteenth. Co. Litt. 46. b. expresses in point. From whence it follows, that the livery was void, for livery *in praesenti* could not be made to a freehold to commence *in futuro*. The council of the other side agreed that a freehold could not commence *in futuro*, and therefore if the day of the date be excluded, the objection is fatal. But (by them) the day of the date in this case is not excluded, for [*datum*] signifies no more than [given] in English. And therefore old epistles instead of the inscription dated such a day, say, given such a day. Then if an indenture of lease was made to commence from the giving of it, it shall commence without doubt from the day in which it was given, and there could not be any difference between the same word, or rather the same sense, in Latin and English. Besides, that it is adjudged, that if a lease is made to begin from the making of the deed, it shall begin the same day that it becomes a deed, which is the same day that it is delivered. 5 Rep. 1. Clayton's case. Co. Litt. 46. b. And the same reason holds place in case where it is limited to begin from the date, that it shall begin the day of the delivery; for *datum prima facie* signifies *deliberatum*. And as to the objection, that Co. Litt. 46. is to the contrary, that

book

book is founded upon 5 Co. 1. b. Clayton's case, where this point is not resolved by the court, but inferred by the reporter of the case from Popham in Dier 218. which book does not warrant any such opinion. And Although 3 Bulstr. 203, Bacon vers. Waller, Mo. 40. pl. 128. agrees with 5 Co. 1. yet 2 Cro. 135, Osborne : Roll. Rep. 387. vers. Rider, 258 Llewellyn vers. Williams, are contrary. 2. The council, to maintain the lease, argued, that this difference might be maintained by law, that where it is in point of interest, that is conveyed from one to another, as in a lease for years, there *a datu* includes the day; but where it is in matters of account, where no matter of interest is designed to be passed, as if the one be accountable to the other by deed, there *a datu* is exclusive of the day of the date, as well as *a die datus*. 1 Bulst. 177. And of this opinion was Powell senior justice. But the other justices gave no opinion as to this diversity. 3. It was urged, that in case of a lease for years *habendum a datu* the day might well enough be excluded, because it would be no prejudice to the parties; but in the case of a lease for life, as in the case at bar, it was reasonable, *ut res magis valeat*, to construe the day inclusive, especially since there is no resolution extant, where any estate has been destroyed by such date and livery made the same day. But to this the justices gave no opinion. After several arguments at the bar Treby chief justice was of opinion, that the lease was ill upon the authority of Co. Li. and the other books. But Nevill justice, and the two Powells justices, were of opinion, that the lease was good, for the reasons given by the council in their first point. And judgment was given accordingly this term. *Ex relatione m'ri Salkeld.*

BY Powell junior justice. If the spiritual court refuse the evidence of the son to prove a will in which the father is a legatee, no prohibition is grantable. And he cited this case as lately adjudged before commissioners delegates. There were three witnesses to prove a nuncupative will, two of them were without exception, and the third was son to the legatee; the statute of frauds requires three competent witnesses; the question therefore was, if these three were sufficient, the son not being an evidence by the spiritual law? and adjudged that they were; because two only were required by the spiritual law, and the third was a good witness within the intent of the act of frauds.

A son of a legatee is not a witness to prove a will in the spiritual law.

Trin. Term

8 Will. 3. B. R. 1696.

Sir John Holt Chief Justice.

Sir Thomas Rokeby

Sir John Turton removed this term into the King's Bench out of the Exchequer in the room of Sir William Gregory who died last vacation

Justices.

Sir Samuel Eyre

Memorandum, The last vacation Mr. serjeant Blencowe was made baron of the Exchequer in the room of Sir John Turton removed into the King's Bench.

Petit vers. Smith.

S. C. 5 Mod.
247.
1 Williams 7.
5 Mod. 247.
Comb. 378.
Comyns 3.
Post. 363.

Prohibition was granted to the delegates, to stay a suit there, &c. because they compelled an executor to make distribution of the *surplus*, he having fifty pound devised to him by the will as a legacy; because, there being a will and an executor, the spiritual court cannot compel distribution, but only where the party dies intestate. *Ex relatione m'ri Place,*

Hussey

Hussey *vers.* Jacob.

Hussey brought *assumpsit* against the defendant Jacob upon his acceptance of a bill of exchange drawn upon him by the lord Chandos according to the custom of merchants. The defendant Jacob pleaded, that the lord Chandos played at hazard with the plaintiff Hussey and lost to him at one and the same time 150 l. and that for payment and security of the said sum of 150 l. lost to the plaintiff, he drew this bill of exchange upon the defendant payable to the plaintiff, which the defendant accepted; and then he pleads the statute of gaming of 16 Car. 2 cap. 7. by which this bill of exchange, being given for security of the said sum gained at play, became void, &c. The plaintiff demurs. And Sir Bartholomew Shower for the plaintiff argued, 1. That this was not within the statute; for though he well agreed, that an action could not be maintained against the lord Chandos himself for this money by reason of this statute; but here a third person has made himself chargeable by his own collateral engagement, viz. by the acceptance of the bill, which seems to be out of the intent of the act; for the *assumpsit* of the acceptor is altogether different from that of the drawer; for although the consideration of the drawer was the money won at play, yet the consideration of the acceptance was the honour of the drawer, or his effects in the hands of the acceptor. And the defendant has not pleaded, that the acceptance was *pro solutione et securitate* of it. Besides that it would be of very ill consequence, to suffer the defendant to avoid his own bill and acceptance by this means; for a bill of exchange once accepted by a responsible man, is of such credit among traders, that it passes as current as ready money, and is negotiated from one to another through all Europe, and exchanged upon valuable consideration, till it come back to London. But if the first acceptor shall be admitted to avoid it by the statute of gaming, this will diminish the credit of bills of exchange, and will be a great check to merchandizing. But to this it was answered, and resolved by the court, that if a collateral engagement of a third person shall not be within the intent of the act, the act will be very easily evaded, and in effect rendered useless. And therefore all the court was of opinion, that if a man has lost money at gaming, viz. more than 100 l. at one time, and he procures J. S. to be bound for the payment of it, or as the principal case is, gives a bill of exchange for the payment of it which is accepted, both these securities are void by the said act. But if he who wins, being indebted to a stranger, procures him who loses, to bind himself to the stranger for the payment of the money due by him who

S. C. Comyns

4 12 Mod. 96.

97.

S. C. 1 Salk.

344.

5 Mod. 170.

Carth. 356.

In *assumpsit*

upon a bill of

exchange the

defendant

pleads 16 Car.

2 cap. 7. of

gaming, and

good.

A. loses 150 l.

at gaming to

B. for which

J. S. gives a

bond to B. it

is void by the

act.

Security for

money won at

play assigned

for valuable

consideration

wins becomes good.

Fraudulent conveyance is assigned for valuable consideration, the fraud is purged.

Acceptance of a bill of exchange for honour of the drawer, what?

wins to the stranger, in consideration of a discharge of the money which he hath lost at gaming, this bond which he makes to the stranger is not within the act, because it is made for a just debt. So in this principal case, if the bill of exchange had been afterwards assigned for a valuable consideration, the honesty of this assignment had purged the original canker, and rendered it good enough. As where a fraudulent conveyance is assigned upon valuable consideration, the fraud is purged. (But Sir Bartholomew Shower said, that it was strange, that the party by his assignment could make that good, which was void *ab initio*.) But in this case at bar, the money lost at play is the foundation of the whole, which is ill, and therefore the bill and the acceptance, which are the superstructure, are ill also. Note, This is called an acceptance for the honour of the drawer, when a stranger upon whom the bill was not drawn, in respect of the drawer, and having no effects of his in his hands, accepts it.

2. It was objected for the plaintiff, that the defendant has not brought himself within the statute; for he has not alledged that the lord Chandos and the plaintiff played upon tick or credit according to the words of the act, which is a penal law, and ought to be pursued strictly; for such gaming was not prohibited by the common law. *Sed non allocatur*; for *per curiam* the giving of the bill of exchange makes it evident, that they did not play for ready money, but for credit.

Actions upon bills of exchange are *assumpsits* at common law.

3. It was objected, that the custom, which was the ground of the action, is not answered by the plea. *Sed non allocatur*. For *per curiam* it is confessed and avoided. It is admitted to be good generally, but not with this ingredient. And by Holt chief justice, though these declarations seem to be grounded upon custom, yet this custom is properly the common law. For the acceptance of the bill amounts to a promise in law to pay it, and this promise is grounded upon the consideration of trade.

Where the defendant hath special matter of fact intermixt with law, it may be pleaded specially. See 2 Ventr. 295.

4. It was objected, that the defendant should have pleaded the general issue, and given this matter in evidence; for the statute says, that such contract shall be void; then nothing is due to the plaintiff, and consequently the defendant should have pleaded the general issue, for in effect this plea does but amount to it. *Sed non allocatur*; for, *per curiam*, where the defendant has special matter consisting not only of bare matter of fact, but intermixed with matter of law, which will avoid the charge or action of the plaintiff; he is not obliged to plead the general issue, but may plead it specially. For otherwise he should be obliged to commit a point of law to a jury who is ignorant of it, which would be absurd.

absurd. Therefore in debt upon a bond made by a *feme covert* ^{Assumpsit a-} while she was *coverte de baron*, the defendant may plead the spe- ^{gainst a wo-} cial matter, or *non est factum* and give it in evidence. See 3 Cro. ^{man, the} 871, 909. 4 Co. 13, 14. Lord Cromwell's case. *Hob.* 127. *Poph.* ^{pleads that she} 65. *Dier* 121. So in this case, the defendant might have pleaded ^{is, and at the} the general issue, and have given this matter in evidence, or he ^{time of the} might do as he has done, *viz.* plead it specially. And therefore ^{Assumpsit} judgment was given by the whole court for the defendant. ^{made was, a} *feme covert*. ^{The plaintiff}

showed for cause, that this amounted to the general issue. But adjudged for the defendant, for this matter of fact is intermixed with matter of law, which will excuse the defendant. *Mieb.* 8 Will. 3. B. R. 1696. *James vers. Fowler.*

Note, In this case, the case of one *Rosindale* lately adjudged was Money won at a horse race. cited, where the case in effect was thus. *A.* covenanted with *B.* 3 Salk. 175. that the horse of *A.* should run with the horse of *B.* four heats for 1 Vent. 253. 30*l.* each heat; and in covenant brought for the 120*l.* having won 2 Lev. 94. every heat, the defendant pleaded the statute of gaming; and upon 3 Keb. 254, 259. demurrer it was objected, that this was not within the statute; be- cause the running of each heat for 30*l.* was a distinct and single wager; and then, being but for 30*l.* the statute did not extend to it, the sum prohibited by the statute being 100*l.* or more. But it was adjudged that it was void for the whole; for it was but one intire and single contract, though the horses were to run four times; and then the sum won amounting to 120*l.* it was expressly prohibited by the act. *Ex relatione m'ri Salkeld.* S. C. 3 Keb. 254, 259. *Intr.* Trin. 25 Car. 2. Rot. 1233. in B. R.

Wilkinson vers. Kitchin.

THE plaintiff being committed to prison, two indictments for clipping, &c. being found against him by the grand jury, sent for the defendant being a *Newgate* solicitor, and gave him 70*l.* at several days, to procure his discharge, and for his pains. And not being prosecuted upon these indictments, he brought *indebitatus assumpsit* against the defendant for the whole 70*l.* And upon the trial at *Guildhall*, Trin. 8 Will. 3. before *Holt* chief justice of B. R. the question was, whether money given to a man to be expended in an ill use might be recovered by the giver who was *particeps criminis*. And Sir *Bartolomew Shower* cited a case, where a bribe was given to a customhouse officer for exempting goods from the payment of customs, which being discovered, and the goods seized, the party recovered his money in *indebitatus assumpsit*. And afterwards it being proved in this case, that the defendant confessed, that he had disposed of this money in bribes, the jury by direction gave a verdict for the plaintiff. *Ex relatione m'ri Nott.*

A a

Jones

Jones *vers.* Bodecener.S. C. 1 Salk.
173.5 Mod. 310.
Carth. 370.When judg-
ment shall be
given upon
confession or
verdict?5 Mod. 225,
6, 7.S. C. Comyns
8.

TRespass for the plaintiff's close broken, and cattle taken in *Blackacre*. The defendant pleads, that the plaintiff was outlawed in debt at the suit of J. S. upon which a *capias utlagatum* issued against the plaintiff, and a *levari facias teste Hil. 6 Will. & Mar.* issued out of the Exchequer directed to the sheriff of N. commanding him to levy the issues and profits of the plaintiff's lands to the use of the King, that this writ was delivered to the sheriff at A. upon which the sheriff made his warrant, directed to the defendant his bailiff, *virtute cujus* the defendant entered into B. being the plaintiff's land, and took there the cattle. Upon which the plaintiff replied, that the defendant took the plaintiff's cattle at O. *absque hoc* that he took them at B. And issue being joined upon this, the verdict was for the plaintiff. And it was moved by Mr. Northey, that no judgment can be given upon this verdict. For if there is no matter of bar in a plea, and issue is joined thereupon, it is void, and not aided by the statutes of jeofailes. But if a plea contain matter of bar, and issue is joined upon a thing not material, this is aided by 32 Hen. 8. cap. 30. 3 Cro. 227. *Lovelace vers. Grimsden.* 259. *Gurny vers. Sir Edw. Clere.* Now here the matter of the plea is merely frivolous, for there cannot be any writ *teste Hil. 6 Will. & Mar.* because the queen died before *Hil. sexto* came. But Shower for the plaintiff argued, that there was here a proper plea, but ill pleaded; and there is a manifest difference between a thing which is a good bar but ill pleaded, and a thing which is no bar but merely frivolous. Now here there is a colourable bar, *viz.* consisting of a writ which would have been good in respect of the matter, if it had not mistaken, and that is aided by the statutes of jeofailes. 3 Cro. 455. *Chamberlain vers. Nichols.* 778. *Dighton vers. Bartholomew.* Hob. 326. *Reynolds vers. Buckle.* Raym. 458. *Sir George Fletcher's case.* Cro. Car. 25. *Knight vers. Harvy.* Mo. 696. pl. 969. *Wilcock vers. Hewson.* 2 Cro 678. 1 Saund. 228. But by Holt chief justice, and the whole court, judgment must be given for the plaintiff, upon the confession, and not upon the verdict; and a new writ of inquiry must be awarded for the damages. For the issue being perfectly immaterial (for it cannot be a taking at O. by virtue of an impossible writ) the jury could not give damages. Therefore the verdict was set aside, and judgment was entered for the plaintiff upon the confession of the defendant, who hath admitted the trespass.

Beston *vers.* Hayward.

Mich. 8 Will. 3. B. R.

TRespass for breaking his close, and digging therein at B. New assign-
ment how
made. The defendant justifies by a way, &c. The plaintiff replies, that the trespass whereof he complains was not committed in the way which the defendant claims, but in another part of the close, *et hoc paratus est verificare, unde ex quo praedictus defendens ad transgressionem praedictam in clauso praedicto de novo assign. factam superius non respondet idem querens petit judicium et damna, &c.* The defendant demurred. And Northey for the defendant took exception to this new assignment, because it does not say *alia quam in barra*, as the old precedents are 2 Co. 6. &c. But by Holt chief justice, the trespass here being for breaking of the close, and the new assignment being in the same close, the plaintiff has pleaded better than if he had said *alia quam in barra*. And therefore judgment was given for the plaintiff.

Smith *vers.* Thwaite.

A. Makes his will and B. executor, and devises divers legacies, and afterwards all the residue of his goods (if there shall be any remaining) to C. and D. E. and F. son and daughter of C. and D. were witnesses to prove this will, and G. the third witness was without exception. And it was adjudged by the commissioners delegates (of whom the two *Powells* justices, and Sir *Samuel Eyre* justice were three) that E. and F. cannot be admitted to be witnesses to prove this will, because their father and mother upon contingency (*viz.* if there shall be any remainder of the goods after the legacies before devised shall be paid) shall be legatees. This case was cited by *Powell junior* justice in C. B. this term. 1 Wms. 10.
Son of a con-
tingent legatee
by the spiritu-
al law cannot
prove the will.

Lambert *vers.* Thornton.

Intr. Trin. 7 Will. 3. C. B. Rot. 416.

TRespass for taking and impounding of a gelding. The defendant justifies, that T. B. was seised of the manor of P. in fee, and that there was a custom within the manor, that the homage sworn at the court baron should make by-laws, &c. then he shews, that the homage at the court held before the steward Distress ad-
pointed by a
by-law. made

made a by-law, that inhabitants within the manor should be chosen annually by the homage to be field-reeves within the manor; and that if any inhabitant chosen by the homage to serve as field-reeve should refuse to serve, he should forfeit 10*l.* which should be levied by distress; and then he shews, that the plaintiff was elected, &c. and refused to serve, &c. by which the fine of 10*l.* &c. the defendant as bailiff, &c. took the gelding as a distress, &c. The plaintiff replies, *de injuria sua propria absque tali causa*. Verdict upon issue joined for the defendant. And motion was made in arrest of judgment by Wright serjeant, that the defendant has not prescribed to levy the penalty by distress. And it was argued several times, but afterwards it was adjudged, that it was well enough; because the prescription being for the by-law, and the by-law itself ordaining a distress, it is the same thing as if the prescription had appointed the distress. Second exception, because it is said, that the by-law was made at the court held *coram senescallo*, where it ought to have been *señalatoribus*. *Sed non allocatur*; for by prescription a court may be held before the steward; and after verdict the court said that they would intend it so, because it was necessary to be proved upon the issue *injuria sua propria*. Judgment for the defendant. *Ex relatione m^{ri} Daly.*

Mich.

Mich. Term

8 Will. 3. B. R. 1696.

Sir John Holt *Chief Justice.*

Sir Thomas Rokeby

Sir John Turton

Sir Samuel Eyre

} *Justices.*

Duncomb *vers.* Church, warden of the Fleet.

DUNCOMB commenced an action in B. R. against the defendant, who imparled with *salvis omnibus advantagiis quoad* S. C. Salk. 1: Ante 35.

billam praedictam, and afterwards pleaded privilege in C. B. as warden of the Fleet. The plaintiff replies, that at the time of

the exhibiting of his bill the defendant was *in custodia marescalli in quodam placito debiti ad sectam A. B.* an attorney of the King's Bench. The defendant demurs. An exception was taken to the replication, because it does not say, *prout patet per recordum*, and therefore the defendant is deprived of the benefit of joining issue.

But *per curiam* it is aided by the general demurrer, and so it has been often ruled in the King's Bench. For if the record be shewn in pleading, the plaintiff may reply *nul tiel record*, although the defendant has not concluded with *prout patet per recordum*; and therefore it is but form. Conclusion without prout patet per recordum is but form.

See 1 Saund. 98, 328. 1 Sid. 324. And Holt after argument at the bar, seemed to be of opinion, that the plea was ill, 1. Because after a general imparlance this matter could not have been pleaded; then though there is a special imparlance, yet this imparlance is with *salvis omnibus advantagiis ad billam* only, and therefore this plea, which is to the jurisdiction, is not saved. See now the stat. 4 & 5 Ann. c. 16. s. 1.

2. It seemed to him, that a privileged person may plead his privilege, notwithstanding that he is in custody of the marshal, and declared against as in custody. But if he be in custody upon a waiver of privilege, or upon attachment of privilege, he is liable Privilege is not pleadable after a special imparlance with *salvis advantagiis* only quoad *billam*.

12 Mod. 102. Gilb. Hist. C. B. 148. Lilly's P. R. cites Hil. 22 Car. 1. If a man in custody of the marshal may plead privilege?

B b

to

to the actions of all men. It seems hard, that whilst a man waives his privilege to one action, he should be exposed to all men; but if the case were so, it ought to be pleaded specially. But to this matter no positive resolution was given, because the suit was discontinued by consent of the parties.

Rex *vers.* Bernard.

S. C. 2 Salk.
502.
Skin. 669.
Indictment
for not serving
constable, &c.

Corporation
prescribes to
chuse a con-
stable.

MOtion was made to quash an indictment against the defendant for refusing to serve the office of constable; which indictment set forth, that *Bernard* was elected by the mayor and aldermen of *Southampton* upon the fourth of *May*, *debito modo secundum consuetudinem, &c.* And the court refused to quash it upon motion, but drove the defendant to plead to it or demur. And afterwards the defendant having demurred, in *Hilary Term 8 Will. 3.* after argument by Mr. *Northey* for the defendant, and Sir *Bartholomew Shower* for the King, it was quashed; because although by custom the election of a constable may be by the corporation, because the government of the place is reposed in them; yet this is not of common right, but they ought to prescribe for it, which is not done here; for the *debito modo secundum consuetudinem villae, &c.* it not sufficient, but the prescription should have been specially made. And for this reason principally, though there were other faults in the indictment, judgment was given for the defendant.

Tite *vers.* episcopum Worcester.

S. C. 1 Salk.
48.
Amendment
of the *nisi*
prius roll by
the plea roll.
8 Rep. 161.
12 Mod. 107.
Comb. 393.

Ejectment was brought against the bishop of *Worcester* and six others, who all seven entred into the rule to confess lease, entry, and ouster. The plea roll, the *distringas*, and the *jurata*, were against seven defendants, but the *nisi prius* roll, and the *postea*, made mention but of five defendants. And now after verdict for the plaintiff at *nisi prius*, it was moved in *B. R.* that for this omission of two of the defendants in the *nisi prius* roll, and in the *postea*, the action was discontinued against all. Upon which the plaintiff made application to *Treby* chief justice of *C. B.* before whom this cause was tried at *nisi prius*, to return the *postea*, that all the seven defendants were found guilty; and in truth the fact was so, for all the seven defendants appeared at the trial, and made defense, and verdict was given against them all. Upon which *Treby* chief justice demanded the opinion of his brothers in *C. B.* who were all of opinion, that it might be amended; for it was the error of the clerk in the transcribing only. Upon which *Treby* said, that he would return the *postea*, that all seven were found guilty. (All

(All which I heard, being present in C. B.) And afterwards the plaintiff moved in B. R. that the court would give him leave to amend the *nisi prius* roll, &c. by the plea roll. Against which it was objected, that the judge of *nisi prius* had no authority to try this issue; for the issue being betwixt A. and B. upon the *nisi prius* roll only, he had no authority to try an issue between A. and B. and C. especially in this action, where one defendant may be found guilty, and another acquitted. 2. If the *postea* be amended, this will be to alter the verdict, and subject the jury to an attain. Besides that the authority of the justices of *nisi prius* is but ministerial to the court, and the *postea* is an account of the matters committed to them. If they give account of an issue tried between A. and B. the King's Bench cannot make this a trial between A. and B. and C. But by all the court order was given, that it should be amended. For upon the whole matter it appears, that this was but a mistake of the clerk; for it appears by the issue roll, that issue was joined by all seven, and therefore it may well be amended by it. As where debt is brought against the heir upon the bond of the ancestor, in which he bound himself and his heirs; if in the declaration the word *heirs* be omitted, though the *git* of the action depends upon this word; yet because it is but the slip of the clerk, who had the bond before him, it shall be amended by the bond. And this alteration will not subject the jury to an attain; for issue was joined by all seven, and defense in fact was made by all seven, and all seven were found guilty. And it appears also, that the judge of *nisi prius* would have had perfect authority to try this cause between the plaintiff and the seven defendants, if the clerk had not made this slip; and therefore this slip of the clerk being amended, all will be complete. And the amendment was made accordingly. And afterwards Sir Bartholomew Shower moved, that the plaintiff should pay costs for this amendment, because the defendants had sued a writ of error for this error only, which was a great expense. But it was denied by the court, because this amendment was made before judgment was given, at which time the defendants ought not to have sued their writ of error, but should have waited till judgment should be given. Mr. Salkeld, Mr. Jacob. After rule for judgment for the plaintiff, and before entry of it, the defendant brought error. Afterwards in the entry of the judgment the clerk made an error by mistake; and leave was given to the plaintiff, to amend without payment of costs. Mich. 10 Will. 3. B. R. Ex relatione m^ri Jacob.

Debt against heir upon the ancestor's bond, in the declaration the word *heirs* is omitted, it shall be amended by the bond.

Amendment after verdict without payment of costs.

Olderoon *vers.* Pickering.

S. C. 2 Salk.
464.
Carth. 376.
3 Danv. Abr.
379 p. 30.
No distribu-
tion of an
estate *pur au-*
ter vie by 22
Car. 2.
cap. 10.
Comb. 388.
12 Mod. 103.
3 Salk. 137.
2 Wms. 381,
382.
3 Wms. 102.

Bona, what?

Affirmative
statute intro-
ductive of a
new law.

THE plaintiff declared upon an attachment upon a prohibition; and the single question was, whether an administrator, who has an estate *pur auter vie* by the statute of 29 Car. 2. cap. 3. be compellable to make distribution of it, after debts paid, by the 22 Car. 2. cap. 10. And Mr. Ward argued, that he shall be compellable to make distribution of it. 1. Because an act subsequent may be within the equity of an act precedent. Then such estate being made by 29 Car. 2. cap. 3. *assets* in the hands of the administrator, by this it is made subject to all the other qualities of *assets*; and from a freehold it is changed into a chattel, for it passes to the administrator without livery. Upon a *fieri facias* (which is only *de bonis et catallis*) against the administrator, it shall be sold; and upon a plea of *plene administravit*, if such estate *pur auter vie* remain in the hands of the administrator, it shall be found against him. 2. The spiritual court has jurisdiction of such suit for distribution, for the ordinary has power over such estate, which he passes by the granting of administration; and therefore a legatee may sue an executor in the spiritual court, though he has no other *assets* but such an estate; for if the legacy be of 100*l.* and the executor hath goods and chattels but to the value of 10*l.* but he hath an estate *pur auter vie* to the value of the residue; in what court shall this legatee sue, if not in the spiritual court, for at common law a man cannot sue for a legacy? Besides, admitting such an estate to be a freehold, yet it may well be comprehended in the word *goods*, which the statute of distributions makes use of. For *bona* by the canonists and civilians signifies any thing in which a man hath property; and the ordinary, under whose controul these distributions are, is guided by those laws. The statutes of 31 Ed. 3. cap. 11. and 21 Hen. 8. cap. 5. which appoint administration to be granted, mention the word *goods*, and yet terms for years are within those statutes. But farther, the 22 Car. 2. of distributions, appoints the distribution of the estate; and without doubt then this is within the words of the act, for it is an estate. And it is more reasonable, that all the nearest relations should have distribution, than that one of them should enjoy the whole. And therefore he prayed that the court would grant a consultation. Mr. Chesboure *e contra* argued, that the 29 Car. 2. had made such estate *assets*, which is an affirmative statute introductive of a new law, and therefore implies a negative of all matters not necessarily incident to such innovation. But the reason why this passes without livery, or may be sold upon a *fieri facias*; or if an executor pleads *plene administravit*, if such estate remains in his hands, the issue shall be against

against him, is; because these things are essential properties of *assets*, and therefore the statute having made such estate *assets*, incidentally gives to it these properties. But to be distributable is a new quality not at all incident to it as *assets*, nor included in the notion of *assets*, for before this act there were *assets* which were not distributable. And the intire intent of the act is satisfied without such distribution. For the statute says, that it shall be *assets* for the payment of debts; now to make this distributable, does not at all assist to the payment of debts. Besides, the statute does not say, that all *assets* shall be distributable, but goods and chattels. But this estate, though it be *assets*, yet it remains a freehold, and the administrator is tenant to the *praecipe*. A statute may make a fee *assets* for the payment of debts, but by this (as it seems) it shall not be *assets* for the payment of legacies. The statute makes such an estate *assets* in the hands of the heir as special occupant, but this is only for such debts in which the ancestor bound him and his heirs. And where there is no special occupant, it goes to the executors or administrators, to pay creditors, and for no other purpose. Besides that, it is very dangerous to subject a freehold to the power of the ordinary, without exprefs words or necessary consequence; but in this case there is neither the one nor the other. And for these reasons he prayed judgment, that the prohibition should continue. And for these reasons it was so adjudged by the whole court. *Doy.*

Estate per au-
ter vie by
29 Car. 2. cap.
3. is *assets*
only to pay
debts.

Administrator
is tenant to the
praecipe.

Estate per au-
ter vie is *as-*
sets in the
hands of the
heir only for
such debts in
which the an-
cestor bound
himself and
his heirs.

These estates
are now made
distributable
by 14 Geo. 2.
c. 20. § 9.

Hartop *vers.* Holt.

THE plaintiff recovered judgment in debt in *B. R.* upon which a writ of error was brought in the Exchequer chamber, and the judgment was affirmed there; upon which a *scire facias* was sued upon this judgment in *B. R.* and the plaintiff had judgment thereupon given for him. And now the defendant brought a writ of error *tam in redditione judicii quam in adjudicatione executionis*. And notwithstanding this writ of error the plaintiff sued execution, and took the defendant in execution. And now it was moved on the part of the defendant, that he might be discharged. 1. Because the writ of error well lay. 2. Admitting that it did not lie, yet it would be a *supersedeas* to the parties. And as to the first point, it was said, that a writ of error will lie upon an award of execution, and that the execution was as well within the 27th of *Elizabeth*, cap. 8. as the judgment itself. For the statute gives remedy in all actions mentioned there, when the party is grieved in *recordo et processu*; then since this is the grievance of the party, which the statute would relieve, and the party is no more grieved by the judgment than by the execution;

S. C. Salk.
263.
5 Mod. 228.
Comb. 393.
12 Mod. 105.
Error does not
lie in the Ex-
chequer
chamber upon
a judgment in
B. R. tam
quam, after
the first judg-
ment has been
affirmed in the
Exchequer
chamber be-
fore.

Error lies not
upon award of
execution.

tion; error must lie, as well upon the execution, as upon the judgment. 2. This *scire facias* comes in the place of debt at common law; and therefore as error would have lain upon a judgment in such action at common law, so it must lie upon a judgment in *scire facias*, which is of the same nature. 2. It was said, that admitting, that error will not lie in this case, yet it is a *superfedeas* to the parties; because it is the King's writ, and it does not belong to the parties to be judges whether it lies or not. But it was answered to the first point, and adjudged by all the court, that the intent of the statute of 27 *Eliz.* was only to relieve the party grieved upon the merits of the cause, as it was at the time of the first judgment, and not upon any matter subsequent which arises afterwards. When therefore the first judgment was affirmed, the merits of the cause were allowed, and the Exchequer chamber, who ought only to affirm or reverse the first judgment, have executed their full power. It is true, that if a *scire facias* be brought to revive a dormant judgment in *B. R.* error will lie in the Exchequer chamber *tam quam*, because it is only in execution of the first judgment, and it is *quasi* a kind of original action; but if a judgment of the King's Bench be once affirmed in the Exchequer chamber, and then a *scire facias* is brought upon it; it is privileged from any other writ of error; or otherwise the law would be infinite and without end. And the *scire facias* is not in nature of debt at common law; for the one is brought to obtain another judgment, the other to obtain execution. And *Holt* chief justice said, that *Twisden* justice was always of opinion, that error will not lie upon award of execution. As to the second point it was answered and adjudged by the court, that this was the result of the first point; for if the writ of error will not lie, it cannot be a *superfedeas* to the parties (who may proceed at their peril, and it had been punishable if the writ of error had lain) for it were unreasonable to supersede them by a writ of error which does not lie. See 1 *Ventr.* 168. *Skinner vers. Webb.* The same point resolved. Afterwards *Hill.* 8 *Will.* 3. *B. R.* it was held in the case of *Bonies* and *Rawlins* and *Man*, that error in the Exchequer chamber upon judgment in *scire facias* against bail is not a *superfedeas* to the execution, because error does not lie there in such case.

Hicks *vers.* Downing.

alias

Smith *vers.* Baker.

ACTION upon the case was brought by the plaintiff as assignee of the reversion of a messuage against the defendant as assignee of a term of years of the house, for negligent keeping his fire, by which the house was burnt. And upon not guilty pleaded the verdict was for the plaintiff. And upon motion in arrest of judgment it was resolved,

S. C. 1 Salk. 13.
12 Mod. 100.
Case for negligently keeping his fire, by which the house is burnt.

1. That if lessee for years of a house assign over all his term, and the house be burnt by the negligence of the assignee; no action lies for the assignor against the assignee for this. For the assignor had no residuary interest in the house, nor is he liable to the lessor; because he committed no wrong, the assignment being lawful, and the burning not being by his default. So if lessee for three years assigns his term for four years, or demises the house for four years, he does not by this gain any tortious reversion, and it does but amount to an assignment of his interest. And the law is the same in the case aforesaid.

2. That if lessee for three years of a house demises it for two years; in respect of his reversion he may have an action against the lessee for two years, if the house be burnt by his default, because he is liable over to the action of the lessor.

3. That it is not necessary, that such lessee for three years should have a residuary interest in him, when he brings his action; but it is enough, that he had such interest in him, when the house was burnt. And he ought to shew in his declaration, that he had an interest in him then to come, when the house was burnt. See *Cro. Car.* 187. *West vers. Treude. Jacob.*

Bracy's case.

BRacy being committed by commissioners of bankrupts for not answering to the questions proposed to him by the commissioners, was brought to the bar by *habeas corpus*, and after the return filed exceptions were taken, that the return was illegal. The first question was, When and in what manner he had been aiding and assisting in carrying away the bankrupt's goods? And it was objected, that this question was not lawful; for to answer it, would

S. C. 1 Salk. 348.
5 Mod. 308.
Carth. 153.
Comb. 390.
391.
Post. 851.
Questions by commissioners of bankrupts.
1 Jac. 1. cap. 15. par. 10.

be to accuse himself, and to subject him to pay the double value of the goods. But *per curiam* upon view of the statute, that which subjects a man to the penalty, is the not discovering what he knows concerning such goods carried away; and therefore if *Bracy* had answered, that he was aiding in imbeziling and carrying away of the said goods, which goods now lie in such a place; this would have avoided the penalty. And therefore (by them) the question is good.

A man shall give account of what he knows of the goods of a bankrupt before he became bankrupt.

The second question was, What he knew concerning the bankrupt's goods from last? And it did not appear when he became bankrupt, and so it might be after the time mentioned in the question; and no body is bound to give account of what he knew of the goods before he became bankrupt. But by *Holt* chief justice he is bound to give account of it, for that tends to the discovery of what goods the bankrupt had at the time when he became bankrupt. Formerly the time was mentioned when he became bankrupt, but it is omitted now, and that is the wiser course.

Commitment to remain until he conform to the authority of the commissioners.

Commitment until he be discharged by due course of law.

(a) This was *Taxley's* case, Mich. 5 Will. & Mar. B. R. which was for not answering upon examination being committed for suspicion of being a popish priest, upon 35 Eliz. and therefore such commitment until he be discharged, &c. was not good, because it was not pursuant to the act. 1 Salk. 351. See 2 Rep. 65.

But afterwards an exception was taken, that the conclusion of the commitment was ill, for he was committed to remain in prison without bail and mainprise, until he should conform himself to the authority of the commissioners. Now this is ill, because the commissioners have several authorities, and particularly one to make officers to summon all debtors to the bankrupt, &c. Now by force of this conclusion *Bracy* must remain in prison, until he become their summoner. If it was, until he shall conform to their authority in this special matter, it had been good. Or if the commitment were, to remain in prison until he should be discharged by the due course of law (a), it would be ill. As where as statute gives authority to justices of peace, to commit until the party shall account; they committed a man, to remain in prison until he should be discharged by due course of law, and it was held ill. And of this opinion was *Holt* chief justice. And by him the word *submit* in the statute does not mean an act of humble submission, but only to make answer to the question proposed. And the word [and] in the act means [*id est*] and ties the submission to this particular purpose. The prisoner was discharged. *Doy.*

was not pursuant to the act. 1 Salk. 351. See 2 Rep. 65.

Lee *vers.* Brace. Error C. B.

Intr. Hil. 6 Will. 3. B. R. Rot. 929.

Ejectment. Upon a special verdict the question was, If *A.* seised in fee makes a feoffment in fee to the use of himself for life, remainder to his son *B.* and his heirs, and for default of such issue remainder to the right heirs of *A.* and the question was, whether *B.* had an estate-tail or fee. And it was adjudged in C. B. that *B.* had but an estate-tail. And after argument at bar *Holt* chief justice was of the same opinion; for the intent is apparent, and the words which conveyed the estate in fee, are qualified by the subsequent words, and converted into an estate-tail. *Salkeld.*

S. C. Carth. 343.
Mod. 266.
Danv. Abr. 185. p. 13.
2 Inst. 672.
8 Rep. 94.
Sid. 26.
Feoffment to the use of *B.* and his heirs, and for default of issue in *B.* such remainder to *A.* is tail in *B.*

Teuxera Dimater *vers.* Hooper.

CASE. The defendant pleaded in abatement, that the plaintiff was an alien enemy born at, &c. The plaintiff replies that he was born at London, *et hoc paratus est verificare*, &c. The defendant demurs. And exception was taken to the replication, that the plaintiff should have tendred an issue, and not have concluded with an averment. *Sed non allocatur.* For by *Holt* chief justice, if the defendant pleads in abatement, the plaintiff has election, either to reply and tender an issue, or to plead with *hoc paratus est verificare*; and the defendant might have rejoined, that the plaintiff was not born at London, and taken issue, if he pleased. But where a plea in bar is pleaded, if the plaintiff replies issuable matter, he ought to tender issue. Judgment for the plaintiff, that the defendant answer over. *Mr. Sheller.* But if alienage be pleaded at *B.* in bar; and the plaintiff replies, that he was born at *L.* and traverses the being born at *B.* he ought to conclude with an averment. Ruled in this case, as *Mr. Place* told me. See *Rastal. Entr.* 605.

S. C. Comb. 394.
Doct. Placit. 8, 9.
Upon plea in abatement the plaintiff may reply with an averment, or tender issue; *contra* in bar.
See *Rast. Ent.* 252, 605.
Alienage pleaded in bar.

Beaumont *vers.* Pine.

BY *Holt* chief justice, An agent of a regiment is but a servant of the colonel, and the receipt of the agent charges the colonel. There is no privity between the King, or the soldier, and the agent.

Agent of a regiment.

Richards *vers.* Hill.S. C. 5 Mod.
206.Where *per*
quod is mate-
rial, and where
not.

3 Mod. 48.

49.

Show. 64.

3 Lev. 133.

Molare,

THE plaintiff declares, that he was seised of an ancient water-
course and mill, and that the defendant being conusant
thereof diverted the said watercourse, so that it could not flow
to his mill for so long time in certain, *eo quod molare non po-*
tuit, &c. After verdict for the plaintiff it was moved in arrest
of judgment, that the hindrance of the grinding is designed to
be the *git* of the action, and therefore it ought to be shewn ex-
pressly, but here it is not shewn intelligibly; for it should be *mo-*
lere, which signifies to grind, but *molare* has no such signification.
Sed non allocatur. For, *per Holt* chief justice, *et totam curiam*,
where the act implies a *tort* of itself, a *per quod* is not necessary
to support the action, but only aggravates the damages. Now
here it appears a *tort* without the *per quod*, for it is said that the
watercourse could not flow to his mill, and therefore it is good,
especially after verdict. Judgment for the plaintiff.

Mich. Term

8 Will. 3. C. B. 1696.

Sir George Treby Chief Justice.

Sir Edward Nevill

*Sir John Powell, sen. died last
vacation at Exeter on the Justices.
western circuit*

Sir John Powell of Gloucester

Palmer vers. Branch & ux'.

BRANCH and his wife libelled against *Palmer* in the consistory court of *London*, for having spoken in a publick coffee-house defamatory words of the wife, viz. *Palmer* said, Do you hear the news? *J. S.* asked, What news? *Palmer* answered, Mrs. *Branch's* thighs are bare, and *Backhurst* is between them; and added many words too obscene to be repeated. And now upon suggestion that by the custom of *London* whores ought to be carted, and therefore by the custom there, to call a woman whore is actionable, and that these words amount to the charging the wife with whoredom, Mr. Serjeant *Gould* moved for a prohibition, and argued, that words as uncertain as these had been adjudged actionable at common law, and therefore 1 *Ro. Abr.* 66. pl. 13. *Roote v. Molling*. A man says of a woman, that she did lie with a weaver of *Colchester* in a ditch, and the weaver's breeches were down, and they were at it; though she might have lain with the weaver in the ditch without harm, yet these words were adjudged actionable. But to this case *Powell* justice answered, that it appeared by the report of this case in 1 *Rolls Rep.* 420. that the plaintiff had declared with a *per quod maritagium amisit*, or otherwise these words, as it seemed to him, had not been actionable. But *Gould*, admitting that an action would not lie for these words at common law,

What words shall be within the custom of *London*, which makes the calling of another whore actionable? *Salk.* 692, 693. *Cro. Car.* 350. *Ibid.* 486, 487. 4 *Rep.* 18. *Post.* 711.

Hook v.
Hawkins.

law, yet in this case a prohibition ought to be granted, by him; for if *Palmer* had called Mrs. *Branch* whore in express words, then without doubt a prohibition should be granted; because she might have an action in *London*, for whores there by the custom use to be carted. But the custom does not confine this to the specifick word whore, but words which amount to it are actionable. And therefore *Mich. 3 Jac. 2.* between *Hook* and *Hawkins*, the words were, I never had a bastard, but Mrs. *H.* had a bastard, and that after her husband's death. It was adjudged, that these words were within the custom of *London*, because they were tantamount to the word whore. Then in the principal case all the by-standers, who heard these words, doubtless imagined, that Mrs. *Branch* had committed whoredom with *Backburst*. But it was adjudged after several arguments at bar, that a prohibition should not be granted; for though it is not absolutely necessary to make use of the word whore, but words tantamount will bring it within the custom, as the case of *Hook vers. Hawkins* was; yet since the custom is only to cart whores, and every custom ought to be taken strictly, the words ought to be tantamount to accuse the woman of whoredom. But in this case the words may be true, and yet Mrs. *Branch* may be no whore; for the words import only lascivious actions and gestures. And therefore if the defendants proceed in *London* against *Palmer* this court will grant a *habeas corpus*. Then the words being originally of ecclesiastical consufance, there is nothing to oust the spiritual court of this cause but the custom, and the custom does not extend to it. And therefore the spiritual court must have liberty to proceed, and not be prohibited.

Cotsworth *vers.* Betifon.

S. C. Salk.
247.
Dier 105. a.
Doct. Placit.
113.

*De injuria sua
propria aided
by verdict.*

THE plaintiff brought a special action upon the case against the defendant for a pound-breach; and declared, that he had taken a mare of the defendant *per J. G. servientem suum*, and had impounded her *quia cepit in damno suo apud parochiam de St. John Lee existentem*, and that the defendant broke the pound, and chased out the mare, &c. The defendant pleaded, that he gave 6d. to the plaintiff in satisfaction of the trespass, which the plaintiff accepted in satisfaction, and gave leave to the defendant to take the mare out of the pound, and that he took her out accordingly, the gate being open, &c. The plaintiff replied, *de injuria sua propria absque tali causa*. Issue thereupon, and verdict for the plaintiff. And now serjeant *Pemberton* moved in arrest of judgment. 1. That the replication was ill, because the plaintiff should not have traversed the cause generally, but the acceptance in satisfaction. *Sed non allocatur*. For though such issue is improper,

per, and had been ill upon demurrer, yet it is aided by the verdict. *Hob. 76. Banks vers. Parker.* And so it was adjudged *Mich. 23 Car. 2. B. R. Beesly's case.* 2. *Pemberton* argued; that the Beesly's case, plaintiff has not intituled himself to his action, for he has not shewn any title to the place, where he supposes the mare was damage feasant. Then if he has not title to the place where, &c. he could not distrain her, and consequently the distress of the mare was tortious; and if the distress was tortious, the impounding was tortious also; and then the defendant may well justify the breach of the pound. *Sed non allocatur.* For *per curiam*, if a distress be taken without cause and impounded, the party cannot justify the breach of the pound to take it out of the pound, because the distress is now in custody of the law. But if the distress is taken without cause, before it is impounded, the party may make *rescous*. But in this case the taking of the distress is but an inducement to the action, and the breach of the pound is the *git* of the action; and therefore it is not necessary here to shew the cause of the distress so certainly. And *Rast. entr. 444.* and all the other precedents in *parco fracto* are in this manner. And therefore judgment was given by the whole court for the plaintiff.

Parco fracto
though the distress was tortiously impounded.

Inducement.

Philip vers. Ketison.

IN action upon the case the plaintiff declares, that the defendant *Venue.* *falso et malitiose apud Stallum in comitatu Norfolciae crimen per-* Where it may
jurii imposuit upon the plaintiff, *et quod postea scilicet* *ex* be laid in the
malitia praecogitata apud Stallum praedictum fecit et procuravit one county or
quandam falsam informationem perjurii exhiberi against the plaintiff in the other.
in nomine Edwardi Ward militis attornati domino regis generalis
apud Westm. in com. Middx. &c. Upon the general issue pleaded it was tried at *Norfolk* assises, and verdict for the plaintiff. And Mr. serjeant *Wright* moved in arrest of judgment, that the *venue* was ill, because there was nothing of the procurement, or of the exhibition of the information, in *Norfolk*; but all in *Middlesex*. And it is not like *Bulwar's case 7 Co. 1.* because there it is but the continuance of the same *tort*. But there are here two distinct *torts*, for he does not say, that the information was *de perjurio praedicto*; so that *non constat* that the information was for the same perjury. And it cannot be taken, that the procurement was at *Stallum*, because the malice is specially confined to *Stallum*, and the procurement is in *Middlesex* at *Westminster*. If he had not interposed *Stallum* between the malice and the procurement, it might have been intended, that the whole was at *Stallum*. But here he has restrained this construction by the position of the words. And though it is after verdict, yet it is not aided by the statute of *jeoffailes*. For the statute aids, where the *venue* is laid in the proper county

When it is not laid in the proper county, it is not aided by verdict.

county; though it be tried by an ill venue; but if it is not laid in the proper county the statute does not aid it. And to this the court seemed to agree. See 1 Saund. 246. *Crafte v. Boite*. But as to the principal matter the court was of opinion, that this was but an action of one continued tort, and is all one with *Bulwer's* case. For the procuring of the information is but the prosecution of the malice. And it cannot be intended, that the malice and the procurement could be in several places, and therefore it may be laid in the one county or the other. And for these reasons the plaintiff had his judgment. See 2 Mod. 23. *Naylor v. Sharplese*.

Brigstock *vers.* Stannion.

In covenant the breach may be assigned as large as the covenant.

Cro. Jac. 486.

Ibid. 304.

Ibid. 369.

370.

Ibid. 378.

Ibid. 425.

1 Stra. 321.

Comyns 146.

180.

Covenant. The plaintiff declares, that by certain articles of agreement made between the plaintiff and defendant, reciting, that whereas *William* bishop of *Gloucester* had granted to the plaintiff and his father the office of register, &c. and that whereas *John* bishop of *Gloucester*, doubting if the grant made to the plaintiff and his father (being to two) was good, had granted the said office to the defendant's son; upon which differences arose between the plaintiff and defendant; it was agreed between the plaintiff and defendant, that the plaintiff should sue a feigned action against the defendant's son, to try his title to the said office; and that the defendant's son should plead without delay, and at the trial insist only upon the validity of the grant; and that if judgment should be given for the plaintiff in that action, that then the plaintiff should quietly enjoy the said office, and that neither the defendant's son nor any other man as his deputy, or in trust for him, directly or indirectly, should exercise or occupy the said office, or receive any of the profits, &c. then the plaintiff shews, that he sued an action, and that the defendant's son pleaded to issue, according to the agreement, and that *taliter processum fuit*, that judgment was given for the plaintiff; then he avers performance of the whole on his part; and assigns for breach, that *John Fortune* at *D.* in the county of *Gloucester*, such a day, by the assent of the defendant's son, and as deputy to him exercised and occupied the said office, and in trust for him took the profits, and received divers fees, so that the plaintiff was compelled to sue such a day a writ of *mandamus* out of the King's Bench directed to, &c. to be re-admitted to the said office, to the great charge and damage of the plaintiff. 2. He assigned for breach, that the defendant's son prosecuted a writ of *assise* for the said office, which was delivered to the sheriff of *Gloucester* in *debita juris forma exequend'*. And to this declaration the defendant demurred generally. And serjeant *Gooding* for the defendant argued, that the breach was assigned too uncertainly and too

too generally, upon which no issue could be taken. For it is said, that *John Fortune* received divers fees in trust for the defendant's son, but no mention is made of what fees. Now, it being a ministerial office, the fees are certain. And therefore, though perhaps it is not necessary to ascertain every individual fee, yet it is necessary to specify some one. To which purpose it was adjudged between *Hill* and *Dade, &c.* in B. R. Jac. 2. Where the case in effect was thus; That *Dade* and the other defendants were farmers of the Irish revenue of the crown: *Hill* became security to the crown for the defendants for the payment of their rent, and they covenanted with him to indemnify him; upon which *Hill* brought covenant against the defendants, and shewed, that the defendants were arrear in their rents, upon which the lands of *Hill* upon process issuing out of the Exchequer were extended, and his body taken in execution, whereupon he was forced to expend great sums of money; upon which declaration the defendant demurred; and the opinion of the court was with the defendants, because the declaration was too general, for it had not specified what sums he had expended. (But note, *Treby* chief justice said, that he was counsel in the same case, and, by him, no judgment was given in it.) And to the same purpose is *Stile, Rep.* 473, 476. *Arnold v. Floyd.* 2. As this breach is assigned it does not appear, that the defendant's son did any act, but only assented that *John Fortune* should exercise, &c. Now a man may be said to assent to a thing, who does not oppose it. But that is no breach of this covenant, *quia actus non consensus facit reum.* Therefore the plaintiff should have said, that the defendant's son put *John Fortune* into the office, or protected him there when he was in. *Sed non allocatur.* For *per curiam* in an action of covenant the breach may be assigned as large as the covenant is; for all is recoverable in damages, and those damages shall be for the real damages, which the party can prove that he has actually sustained. But in debt upon a bond conditioned to perform covenants in a certain indenture specified, there a precise breach must be shewn, because a breach is a forfeiture of the whole bond. And therefore if this had been debt upon a bond with such a condition, the plaintiff ought to have specified the taking of some particular fee, for the taking of one single fee would have forfeited the whole bond. And *Treby* chief justice cited a case between *Dixey* and *Jenner* adjudged in the King's Bench when *Hale* was chief justice, where the defendant covenanted with the plaintiff to build him a house, and to put cantelabers according to the rules prescribed in the act for the rebuilding of *London*; and in covenant he assigned his breach, that the defendant did not put in such cantelabers *secundum actum parliamenti, &c.* and did not say, of what length or thickness they ought to be; and adjudged, that the breach was well assigned, they

Hill v. Dade, &c.
1 Show. 72.

3 Mod. 69.

In debt upon bond conditioned to perform covenants a precise breach must be shewn.

Dixey v. Jenner.
3 Keb. 142, &c.

they being the very words of the covenant; but if it had been in debt upon a bond conditioned to perform covenants, it had been otherwise. Then in this principal case, the breach being assigned in the words of the covenant, it being in an action of covenant, it is well assigned. 2. Serjeant *Gooding* argued, that the declaration is ill, because it is said, that the plaintiff sued a *mandamus*, and the defendant an assise, but does not say *prout patet per recordum*. But to this serjeant *Wright* for the plaintiff answered, that they are not records until they are returned, and the shewing of the return is not necessary, but is only in aggravation of damages. But the very suing out of the assise, whether it be returned or not, is a breach of the covenant. Of which opinion was the whole court, and therefore judgment was given for the plaintiff.

Lockey vers. Darby.

In debt upon bond if a collateral issue is joined the plaintiff has no need to shew a breach.

1 Leon. 45.
P. 58.
Hob. 198.

Sid. 10.
4 Leon 79.

Debt upon bond to perform an award, if the issue be *non est factum*, the plaintiff has no

LOCKER brought debt upon bond against *Darby*. Upon *oyer* the condition appeared to be, that if the defendant *Darby* should save the plaintiff *Lockey* harmless from all damage that might accrue to him, by the executing of a writ of execution, that then, &c. The defendant pleaded, that the plaintiff *Lockey* did not execute the writ, &c. The plaintiff replies and offers issue thereupon. And the defendant demurs. And serjeant *Birch* for the defendant argued; that the replication is ill, because it has not assigned any breach, and therefore he cannot have judgment. And he compared it to the case, where debt is brought upon a bond conditioned to perform an award, the defendant pleads no award made; if the plaintiff replies and shews an award, he must also assign a breach, or otherwise he shall not recover. And for the same reason in this principal case he should have shewn in his replication, that some action was sued against him for the execution of this writ, or how he was damnified by it. *Sed non allocatur*. For *per curiam* the point here in issue is a collateral matter, to which the defendant by his plea has inveigled the plaintiff; and therefore the plaintiff is not obliged to shew a breach. For the defendant has admitted that the plaintiff was damnified, by offering this plea of a collateral matter. Besides that, if the plaintiff had assigned a breach in the replication, the defendant could not have traversed it, because it would be a departure from his bar. But the case of an award stands upon its own bottom, and will not govern other cases. And by serjeant *Wright* of counsel with the plaintiff, in the case of an award, if the issue be *non est factum*, or if the defendant pleads a release of all demands, by which he offers a special point in issue, the plaintiff has no need to shew a breach, or if the defendant pleads a release of all demands.

Quod non fuit negatum per curiam. See *Telv.* 78. *Jeffrey vers. Guy.* See 3 Lev. In the principal case judgment was given for the plaintiff. See 17, 24. 1 Saund. 103. *Haman v. Gerrard.* 317. *Smith v. Teoman.*

Jenkins vers. Turner.

THE plaintiff brought an action upon his case against the defendant, *pro eo quod* the defendant *scienter retinuit quendam* s. C. 2 Salk, 661. *aprum ad mordendum et percutiendum animalia consuetum, qui quidem* Case, pro eo quod defendens scienter retinuit aprum ad mordendum animalia consuetum, good after verdict. Post. 606. 12 Mod. 332. Regist. 106. b. Ibid. 110. b. *aper* such a day and place *percussit et momordit* a mare of the plaintiffs, of which bite she died. Upon not guilty pleaded, verdict for the plaintiff. And now serjeant Wright moved in arrest of judgment, that the word *animalia* is too general and uncertain, for it may be they were such animals, as though the boar used to bite them, and the defendant knew it, yet it would be no offense in the defendant to keep the boar still; as if the boar had bit frogs, &c. which are animals. And though it may be objected, that it is aided by verdict, yet in this case that cannot be; for the general rule is, that where a thing is so essentially necessary to be proved, that if it had not been given in evidence, the jury could not have given such a verdict, there though it is not mentioned in the declaration, yet this defect shall be aided by the verdict. But our case is not so, for if evidence had been given, that the boar had used to bite any animal, and that he afterwards bit the plaintiff's mare, the jury would think, that this was a foundation good enough for them to find for the plaintiff. But the law is contrary, for unless the boar had used to bite horses, sheep, or such like valuable animals, it would be no offense in the proprietor to keep the boar, notwithstanding that he had bit frogs, &c. Besides, that if such a general charge shall be allowed, the defendant will not know what evidence he must prepare to defend himself. And he cited a case in this court between *Bayntine* and *Sharp* in last *Easter* term, where the plaintiff declared, that the defendant kept a bull, and hoxed him, that he became mad, and that he ran at the plaintiff, and tossed him, &c. Upon not guilty pleaded, verdict for the plaintiff; and the court seemed to be of opinion, that judgment ought to be arrested, because there was no *sciens* in the declaration, which they held was not aided by the verdict; no more is this principal case aided by the verdict. Where omission in the declaration shall be aided by verdict. Bayntine v. Sharp. 1 Lutw. 90. Sciens ought to be in the declaration.

2. He argued, that admitting that the court will intend that *animalia* in this case will signify sheep, &c. yet he said that this is not sufficient, for all the precedents are, that the usage to bite or strike, must be laid to bite or strike the very same species, for the hurt of one of which species the plaintiff brings his action.

F f

And

If a man keeps a dog, which bites sheep, and the man has notice of it, and afterwards the dog bites a mare, an action lies against the man, but the declaration must be special.

3 Lev. 336. *Trover pro catulis, Anglice* whelps, good after verdict.

Pro materialibus muri, good after verdict.

Difference between a boar and a dog.

And therefore in this case the plaintiff should have declared, that the boar was accustomed to bite mares. For if a man keeps a dog, which bites a mare, and notwithstanding after notice of this the owner keeps the dog still, and afterwards he bites a man, the man has no remedy against the owner of the dog. And for these reasons he prayed, that judgment should be arrested. *Sed non allocatur.* For by *Powell* justice, if a man keeps a dog, which is accustomed to bite sheep, &c. and the owner knows it, and notwithstanding he keeps the dog still, and afterwards the dog bites a horse, this shall be actionable, notwithstanding that the precedents are all of the same species; because the owner, after notice of the first mischief, ought to have destroyed or hindered him from doing any more hurt. Now in this case the fact was, that the boar had bit a child before, of which the defendant had notice, and afterwards he bit this mare of the plaintiff's. The question then will be, how the plaintiff in such case ought to declare? And it seems that he ought to have particularly shewn what mischief the boar had done before; and for want of that, upon demurrer it had been ill. But now the question is, if this declaration is not aided by the verdict, it being objected that this word *animalia* is too uncertain, for it might be frogs, &c. and that the defendant could not know what evidence he must procure, to defend himself at the trial? But he said, that this is no objection, for the defendant knows that no evidence can be given of any mischief done by the boar, but of that of which he hath had notice. And as to the uncertainty *Powell* justice said, that the judge of assise knew well that this would not be actionable, unless that the boar had used to kill or bite horses, sheep, &c. and not frogs; and consequently, if that had not been proved, he would not have permitted the jury to have given a verdict for the plaintiff. And for this reason the court will intend, that such things were given in evidence; and that greater uncertainties and defects had been aided by verdict. Serjeant *Lutwyche*, council for the plaintiff, cited 2 *Jones* 125. 1 *Sid.* 223. *Wright vers. Berle.* And in *trover pro catulis* generally, *Anglice* whelps, in C. B. lately adjudged good after verdict. And in the same court *indebitatus assumpsit pro materialibus muri*, good after verdict, adjudged. And as to the case of *Bayntine* and *Sharp*, objected by the defendant's council, *Powell* justice answered, that there was no *sciens*, and for that the defendant was not liable to the action; and the court could not intend, that it was proved at the trial, because the plaintiff has no need to prove more than is in his declaration. But in this case there is *animalia* in the declaration, and therefore it was necessary for the plaintiff to prove that the boar used to bite some animals; and then after verdict we will intend, that they were such animals, as will support the action. But (by him) there may be a difference between a boar and a dog; for

for it is the nature of a dog to kill animals which are *ferae naturae*, as hares, cats, &c. but it is not natural to boars to kill any thing. And therefore in the case of a dog there might have been a question, whether the word *animalia* had been good in the declaration, because it might have been intended of some such animals as they naturally bite and kill. But since a boar does not naturally kill any, it shall be intended as before is said. And therefore judgment was given for the plainriff. See *Regist.* 106. b. 110. a. the case in point, as this principal case was. Note; Though this case was several times argued, yet *Treby* chief justice did not give his opinion, the judgment being given by *Powell* justice, in his absence.

Stream *vers.* Seyer.

Replevin of a mare taken at a place called *B.* in *Bucks.* The defendant makes confession, that the place contained six acres, and that *Robert Saunders* was seised thereof in fee, and being so seised granted a rent-charge out of the same to *Robert Lee* in fee; that *Robert Lee* the father died, by which the rent descended to *Robert Lee* the son; and that *Robert Lee* the son, being seised thereof, the seventh of *February* 13 *Car.* 1. by indenture of bargain and sale, between him of the first part, and *Edmund Moss* of the second, bargained and sold the said rent to the said *Edmund Moss*, which indenture was inrolled within the six months; that *Edmund Moss* died, whereby the rent descended to *Edmund Moss* his son; that the rent was arrear, and that the defendant as servant to *Moss* and by his command took the mare in the place where, &c. as a distress, &c. The plaintiff pleaded in bar to the confession, *non est factum* of *Robert Saunders*. And issue thereupon and verdict for the defendant, that it was the deed of *Robert Saunders*. And serjeant *Birch* moved in arrest of judgment, that the defendant by his own confession shews, that *Edmund Moss*, under whom he claims, had no title to the rent. For he says, that *Robert Lee dedit et concessit*, by deed of bargain and sale inrolled, the rent to *Edmund Moss*, but he does not shew any consideration. Then without consideration this cannot be good by the statute. And it cannot be good by the common law, because it does not appear that any attornment was made by the terre-tenant. And he cited 3 *Cro.* 116. as a case in point. Then this cannot be aided by the verdict, because the issue was taken upon the other deed of *Robert Saunders*. *Sed non allocatur.* For *per curiam*, if the plaintiff had taken issue upon the bargain and sale, and it had been found for the defendant, it had been good after verdict, though no express consideration had been mentioned. As in the case of *Barber v. Fox* in *B. R.* in the time of *Charles* the Second, where a bargain and sale was pleaded

Bargain and sale pleaded without shewing a consideration, and good after a verdict on a collateral issue.

1 Vent. 108. T. Raym. 200.

Barber v. Fox, *tempore*, *Car.* 2

pro

pro quadam pecunie summa, and it was not said what sum, and yet it was adjudged to be aided by the verdict. Then in this case the plaintiff has waived the benefit of this exception by taking of issue upon the other deed; but if he had demurred, this fault had been fatal to the defendant. But now after verdict it is good enough. And therefore judgment was given for the defendant, *nisi*, &c.

Hulbert *vers.* Watts & ux'.

Condition that A. or his heirs or assigns shall reconvey to B. such land in fee. A. devises to C. being an infant, in tail, remainder to D. the condition is broken, *contra* if the land had descended to C. being an infant.

DEBT upon bond against the defendant and his wife as executrix to *Cornelius Cliffe*. The defendants pray *oyer* of the condition, which was to perform certain covenants contained in an indenture bearing the same date with the bond, in which *Cornelius Cliffe* covenanted with *Roger Hulbert*, &c. for him, his heirs and executors, that if *Roger Fulbert* should pay to *Cliffe*, his heirs or assigns, 100*l.* within five years after the date of the indenture, that then *Cliffe*, his heirs and assigns, at the proper charges of *Roger Hulbert*, should transfer to him, &c. the tenements, &c. free from all incumbrances by *Cliffe*, his heirs and assigns. The defendants plead, that *Cliffe* was seised of the tenements, &c. in fee, and being so seised, the 19th of November 3 Will. & Mar. by will in writing devised them to his daughter *Katharine Blicke* in tail, remainder to the defendant's wife in fee; that *Katharine Blicke* died without issue, whereby the lands came to the defendant's wife, who is seised of them in fee; and that the plaintiff *Roger Hulbert* did not pay the said 100*l.* neither to *Cliffe* in his life-time, nor to *Katharine Blicke* in her life-time, nor to the defendant's wife, &c. The plaintiff replies, that *Katharine Blicke* at the time of the death of *Cliffe* was within the age of one and twenty years. The defendant demurs. And serjeant *Wright* for the defendant argued, that if there was any means by which the infant might have conveyed, then the devise to her would not be a breach of the covenant. But the infant might have conveyed these tenements by common recovery by guardian or privy seal. Lord *Newport's* case. And it is the usual practice, for infants to suffer common recoveries; so that *Katharine Blicke* might have performed her part, if the plaintiff had paid the 100*l.* But she was not bound to convey, till the plaintiff paid the 100*l.* And therefore this is not like Sir *Antony Maine's* case, 5 Co. 21. for there by the grant and render by fine for years Sir *Antony Maine* had disabled himself from the taking of a surrender, and the making of a new lease; and therefore there it would be in vain, that the lessee should surrender to a man, who could not take it. But in this case if the plaintiff had paid the 100*l.* the infant might have conveyed the tenements by common recovery. *Sed non allocatur.*

For

For, *per curiam*, the devise to a person who was incapable to convey, within the five years, was a breach of the covenant. And it would be vain, to compel the plaintiff to pay the 100*l.* to a man who was incapable to perform his part. For as to the objection, that an infant may suffer a common recovery; though the King grant a privy seal, yet it is in the discretion of the court, whether they will permit it to pass: and the judges do not permit it, but when it will be advantageous to the infant; and though it is passed, yet it is avoidable by error. And one may object in the same manner, that if a feoffment be made to a man upon condition to reinfteoff the feoffor, and the feoffee takes a wife, that this will not be a breach of the condition, because the husband and wife may levy a fine to the feoffor, which will bar the wife of her title to dower in these lands; but yet this is adjudged a breach, because the party has once put it out of his power. But in the principal case, if *Cliffe* had died, and left an heir within age, to whom the land had descended; this had not been a breach, because it had been an act in law. Judgment for the plaintiff, *nisi*, &c.

The law will not compel to a vain thing.
See T. Jones 195.
10 Rep. 42,
43. Ma.
Portington.
Sid. 321.
Godb. 161.
Ley 83.
Hob. 197.
Jenk. 299. pl. 60.
Piggot 64, 65.
Recovery suffered by an infant by guardian with privy seal is voidable for error.
1 Ro. 428.
V. 1.

The master and company of Framework-knitters
vers. Green.

DEBT upon a by-law. The plaintiff declares, that King *Charles* the Second, by his letters patent, bearing date the nineteenth of *August* in the fifteenth year of his reign, incorporated them by the name of *The master, wardens, assistants, and company of Framework-knitters*, with power to make by-laws for the benefit of the corporation, and to inflict penalties for inforcing the performance of them; then they shew a by-law, that the master, wardens, and assistants, or the master and the greater part of them, shall assemble together annually upon the feast of St. *John Baptist*, and chuse two persons, members of the corporation, to be stewards for the year ensuing, who upon the day after the feast of St. *Michael* next ensuing, if it were not *Sunday*, and if it should be *Sunday* then the next day after, should provide a dinner for the master, wardens, and assistants, under the penalty of 10*l.* or such less sum as the master and wardens should judge fitting, to be levied by distress, &c. or recovered by action of debt, to be paid to the master and wardens, &c. then they shew, that the defendant was elected steward, being one of the corporation, and had notice thereof, but did not provide a dinner for the master, &c. nor pay the 10*l.* to the master, wardens, and assistants; *unde actio accrevit* to the plaintiffs, for the 10*l.* *Nil debet* pleaded. Verdict for the plaintiffs. And upon motion in arrest of judgment many exceptions were taken, to which the court gave no resolution. But the chief exception was,

By-law made by a new corporation, that a man elected steward shall make a feast for the members of the corporation, bad.

Mo. 580. Arg. that the by-law itself was ill, because that it is not said, that this
 Goldsb. 49. dinner was appointed, to the end that the company should as-
 Carth. 482. semble, and consult of things beneficial to the corporation. For
 10 Mod. 133. it does not appear, but that this was only for luxury. Then the
 by-law is unreasonable, to compel a man to make a dinner, only
 for the luxury of others, without any benefit to himself or the
 rest of the company. Then the by-law being unreasonable, the
 penalty to perform it is unreasonable also, and consequently not
 obligatory. *Quod curia concessit.* And (by the justices) members
 of corporations are not bound to perform by-laws, unless they are
 reasonable, and the reasonableness of them is examinable by the
 judges. Then this by-law to make the dinner, cannot be good
 in this case of a new corporation, because it does not appear to
 what purpose the dinner is made, and it may be only for good
 fellowship. But if it had been, to make the dinner, to the end
 that the company might assemble and chuse officers, or any other
 thing for the benefit of the corporation, it had been well enough.
 Cro. Jac. 555. But in the case of old corporations by prescription a by-law to
 Lutw. 1320. make a customary feast has been held good. And therefore judg-
 ment was arrested, *nisi, &c.*

Marks *vers.* Marriot.

S. C. Lutw.
 520, 524.
 Lev. Entr. 41.
 Nelf. Abr.
 242.

Hard. 399.
 Cro. Car.
 541. P. 5.

DEBT upon a bond dated 2 July 7 Will. 3. conditioned to per-
 form the award of J. S. of all actions, cause and causes of
 action, suits, debts, trespasses, damages, and demands, &c. what-
 soever, *ita quod* the award be made in writing, and delivered, or
 ready to be delivered, before such a day, upon request to either
 of the parties, &c. The defendant pleads no award made. The
 plaintiff replies, and shews the award, by which the plaintiff should
 pay to the defendant 30 l. in full satisfaction of all demands, the
 13th of September following, and that the defendant, upon the
 payment, should surrender to the plaintiff the possession of a house
 in which the defendant lived, and deliver to the plaintiff a deed,
 by which the house was intailed to the plaintiff, and deliver to
 the plaintiff all bonds, &c. which he had against the plaintiff, and
 that the defendant should execute a general release to the plaintiff
 of all actions, &c. until the 12th of August following, and that
 the plaintiff should then give a general release to the defendant,
 then the plaintiff shews that the defendant had notice of this award,
 and assigns his breach, that although he had paid the money, the
 defendant had not surrendered the possession of the house at the
 day appointed by the award. The defendant demurred. And
 serjeant Girdler for the defendant took exception, that the plaintiff
 has not shewn, that the award was ready to be delivered by the
 day;

day; that being but an authority it ought to be pursued strictly; and he cited *Jenkinson vers. Allen*, Trin. 27. Car. 2. Rot. 728. B. R. 3 Keb. 513, 556, in point, *Sed non allocatur*. For (by Levinz serjeant) when an award is made, it is ready to be delivered; and it shall be intended so, unless it be shewn, that it was refused to be delivered. And he said, that it was lately adjudged accordingly in the King's Bench; which Powell justice seemed to agree; but yet in this case the award was not to be delivered, till request was made; but it does not appear here, that the defendant made any request; and therefore it was well enough. The second exception was, that the award of the possession of the house was ill, because that it is in the realty, and the submission was of all personal things; and though there was the word *demand*, yet it being coupled with debts, trespasses, &c. it shall be construed personally. And Girdler compared it with 9 Edw. 4. 43. b. where the submission was *de omnibus actionibus personalibus, factis, et querelis*, and the award was, that the defendant should release to the plaintiff his right in such a house; and adjudged a void award, because the submission was personal, for *querelis* being coupled with personal actions, it should be construed personally. *Sed non allocatur*. For *per curiam*, in the 9 Edw. 4. *et couples querelis to personalibus actionibus*, but in this case it is general of all demands whatsoever. But by Powell justice, it is a question whether the title to the land is submissible, since it is in the realty, but this being a general submission it is well enough. But Treby chief justice said, that things in the realty might be submitted, as well as things in the personalty, but they could not be recovered upon the award. The third exception was, that the bond of submission is dated in July, and the award is, to release all demands until the twelfth of August following, and the defendant must make the first release, so that if the plaintiff will not make his release afterwards, the defendant has no remedy; and then the award will not be reciprocal. For if the defendant will sue debt upon the bond, and assign his breach in this, that the plaintiff has not executed the release on his part, the plaintiff may plead the defendant's release in bar of the action upon the bond. And by Powell justice, as to this exception of the release, the award is not maintainable. For (by him) the difference is, that if arbitrators make any award of mutual releases generally, this will relate only to the time of the submission, and this will be well enough. But if they award general releases to be executed until the time of the award made, this will be ill, because it exceeds the submission, and will release the bond of submission itself, and all *mesne* acts. And to warrant this difference he cited *Hill*. 16 & 17 Car. 2. C. B. Rot. 503. 1 Keb. 434. But by Treby chief justice it has been held in such case, where releases are awarded, the submission bond shall be intended to be excepted.

case,

case, that the submission bond shall be intended to be excepted. But nevertheless in the principal case they held the award good enough and reciprocal; because the plaintiff was to pay 30 l. to the defendant, and the defendant to surrender the possession of the house to the plaintiff, so that no fault in the releases will vitiate it. And therefore judgment for the plaintiff.

1 Roll. 243.
pl. 9.

Resolved *Mich. 8 Will. 3. B. R.* between *Stevens* and *Matthews*, that if a man submits a particular controversy to arbitration, and the arbitrators award general releases, which are executed, these release no more than the particular controversy. And *per Holt* chief justice, if the arbitrators award releases *ab initio* until the time of the award, and the party releases until the time of the submission, this is a good performance of the award. And *Hil. 8 Will. 3. B. R. per Holt* chief justice, adjudged between *Cooper* and *Pierce*, that an award, to make general releases until the time of the award, is good; because as to *mesne* acts between the submission and award, the award is void, and therefore it does not exceed the submission. And therefore judgment in this case for the plaintiff, where an action was brought to perform such an award. 3 *Mod.* 264. *Reeves vers. Phelps.*

Smith vers. Fuller and 14 other defendants.

Trover against 15 defendants, but the conversion is laid but against 14, all 15 plead and are found guilty, this shall be amended.

T*rover.* The plaintiff declares, that the goods came to the hands of all the defendants, but when he comes to the conversion, he omits the name of one of them. All the fifteen defendants plead by name. And evidence at the trial was given against all fifteen. And verdict for the plaintiff against all fifteen. And judgment was given for the plaintiff. And upon error brought in *B. R.* this omission of the name of one of the defendants in the conversion was assigned for error. Upon which the plaintiff moves in *C. B.* for leave to amend. And serjeant *Wright* objected, this would charge another defendant than the plaintiff had charged. But *per curiam*, it appears that it was but *vitium clerici*, that evidence was given against all, and verdict against all fifteen. And though it was objected, that the jury could not find the fifteenth man guilty, but as the plaintiff had charged him, which was with trover but not with conversion; the court answered, that it could not be intended, that the jury would find him guilty of nothing, for it is no crime to find goods without conversion. And therefore an amendment was ordered upon payment of costs.

Britton *vers.* Gradon.

CASE upon several *assumpsits* against Robert Gradon Esq; The defendant comes in by special *supersedeas* upon the *exigent*,^{1 Vol. 150.} and pleads in this manner: *Robertus Gradon per J. S. attornatum*^{2 Boo. Jud. 353.} *suum venit et defendit vim et injuriam quando, &c.* and pleads that^{Vide Bro. De: fence.} he is a gentleman, *absque hoc* that he is esquire, &c. The plaintiff demurs. Serjeant Girdler for the plaintiff argued, that the defendant, by saying *defendit vim et injuriam quando, &c.* has made a full defense, and after that he cannot plead in abatement. Therefore *Trin. 35 Car. 2. B. R. Rot. 1528.* between *Gawen v. Surby*,^{S. C. Lutw. 52} the case was thus: Trespass, assault and battery. The defendant *venit et defendit vim et injuriam quando, &c.* and pleads outlawry^{Gawen v. Surby.} in abatement after imparlance; the plaintiff demurs; and adjudged that the defendant answer over. 1. Because after imparlance the defendant cannot plead in abatement. 2. He cannot plead such a plea after a full defense by which he has admitted the plaintiff able to recover damages. So *Trin. 4 Will. & Mar. C. B. Meacock*^{Meacock v. Farmer.} *vers. Farmer*, in trespass, assault and maheim, the defendant *venit et defendit vim et injuriam quando*, and pleaded another action depending for the same cause undetermined, in abatement, and judgment *quod respondeat ulterius* for the same reason as before. Serjeant Gould for the defendant. It is good the one way or the other, for this is not a full defense, but the moiety of a defense; for a full defense is, when the defendant proceeds, and says, *et damna et quicquid quod ipse defendere debet* *Trin. 4 Will. & Mar. B. R. intr. Pas. 3 Will. & Mar. B. R. Rot. 449.* The defendant after *vim et injuriam quando* pleaded, that the defendant was an alien enemy; and the court held, that it was good the one way or the other. So *Hill. Will & Mar. Rot. 693. Fenner v. Miller*.^{Fenner v. Miller.} Ejectment. The defendant *venit & defendit vim & injuriam* (but *quando* was not in) &c. and he pleaded antient demesne, and held good. So *Rast. Entr. 339. d.* outlawry pleaded after *quando, &c.*^{1 Salk. 217.} 334. *b.* privilege as servant to a clerk in chancery 472. *d. misnomer* in appeal 49. But *per Powell* justice, *Quando, &c.* amounts to a full defense, and *damna et quicquid quod ipse defendere debet* is never put in. Coke says, that a man cannot plead to the jurisdiction, without making defense; but this rule is not law generally understood; for a man may come and say, *venit & dicit*, that the lands are antient demesne, and it is good without more saying. But the matter of full defense, or half defense, signifies nothing in this case; for the difference is, where the plea is in disability of the person, as alien enemy, outlawry, &c. it cannot be pleaded^{Full defense, what?} person (as alien) cannot be pleaded after a full defense, but other pleas in abatement may.^{Co. Li. 127. b. A man may plead to the jurisdiction without making defense. 3 Lev. 192. Show. 386. Pleas in disability of the}

H h

after

Up. B. prec.
2. 3.

General and
special de-
fense.

H. 21. E. 4.
P. 13.

Misnomer
cannot be
pleaded in a-
batement by
attorney.

In case of cor-
porations they
plead misno-
mer in abate-
ment by spe-
cial warrant.
℥

Attorney may
give addition
to his client.

after full defense, because it is repugnant, for by the full defense the defendant has admitted the plaintiff able to recover damages, but other pleas in abatement may be pleaded after full defense, for a full defense never admits an ill writ. *Coke* says, that the defense admits the person of a plaintiff able to sue, but he does not say that it admits the cause; and therefore *misnomer* in the defendant may be pleaded after full defense, and *Rastall* has many precedents of it. But there is a difference between a general defense and a special defense; as this which the defendant has made is general, and therefore he cannot plead *misnomer* after it; but he might have made a special defense, viz. *Robert Gradon* gentleman, who is impleaded by the name of *Robert Gradon* esquire *venit et defendit vim et injuriam quando*, and then he might have gone on with his plea of *misnomer*. But here by his general defense he has admitted himself to be an esquire as named in the writ, and therefore he cannot afterward gainsay it. But *Treby* chief justice was of opinion, that it was a general rule, that no body shall plead in abatement after a general defense or a full defense; and therefore he doubted much, if the distinctions which *Powell* justice had taken were law. A second exception was, that the defendant comes in by attorney and pleads *misnomer*, where he ought to plead in person. But to this *Gould* answered, that *Rast. Entr.* 108. is the case, and a precedent in point, upon sight of which the defendant drew this plea. But by *Powell* justice, regularly an attorney cannot plead *misnomer* in his client, but the defendant must plead it himself, because the attorney is estopped by his warrant, to say that the defendant had any other name, than that by which he gave him his warrant of attorney. And therefore in this case the plea being by attorney is ill. But by leave of the court he might have a special warrant of attorney, and then the attorney shall not be estopped. *Long 5 Edw.* 4. 108. And in case of corporations the court ought to allow attorneys to plead *misnomer* by special warrant, because the corporation cannot appear in person. And in *8 Edw.* 4. 9. it is agreed, that there might be a special warrant in case of a particular person. But in this case it must be intended a general warrant, and so the attorney was estopped. And the special *superfedeas* signifies nothing as to the attorney, but prevented the estoppel to the defendant himself. But there are some *misnomers*, which attorneys may plead, which are not contrary to their warrants. As *2 Hen.* 6. 11. an action was brought against the late wife of *J. S.* the attorney said his client was a countess; and it was agreed that the attorney might give his client the addition, because it was not contrary to his warrant. And the case in *Rastall* 108. which misled the defendant, with this difference, might be good in law; for the action is brought against *J. S. of Dale*; the attorney says, that there are two *Dales*, *Upper Dale* and

and *Netber Dale*, and no such town as *Dale* without addition, and this was good, because it was not contrary to his warrant, but is the same *Dale* with an addition. But *Treby* chief justice was of opinion, that *misnomer* could not be pleaded by attorney, because the attorney is estopped by his warrant. 2 Hen. 6. 11. And he relied upon *Fitzb. Nat. Br. 27. a.* as express in point, where it is said, that he who pleads a *misnomer*, shall not appear by attorney; and he had never seen a precedent to the contrary. That the first entry is in *Aston's placita rediviva*, which he did not regard, because he supposed it passed *sub silentio*. And as to the special warrant of attorney he doubted much of it. And it seemed to him, that there was no necessity for a corporation to plead a *misnomer* by attorney; for if judgment be given against them by a wrong name, the judgment will be void; and there was no special warrant in *Rastall*, therefore it seemed to him, that such special warrant could not be granted. But they all agreed, that the plea in the principal case was ill for the reasons aforesaid. And therefore judgment, *quod defendens respondeat ulterius*. Like judgment was given this term between *Strange* and *Reynolds*, where the defendant pleaded *misnomer* by attorney for the same reason. And between *Burdett* and *Cupper*, Hil. 8 & 9 Will. 3. C. B.

Judgment against a corporation by a wrong name is void.

Strange v. Reynolds.

Burdett v. Cupper.

Jones *vers.* Axen.

DEBT upon bond. The defendant pleads the statutes for discharge of poor prisoners, and so demanded judgment if the plaintiff shall have execution against his body, household goods, wearing apparel, or tools of his trade. The plaintiff demurs. The first exception to the plea was, that the statute is misrecited, because it is pleaded to be made the 22 Car. 2. but the printed book is 22 & 23 Car. 2. But to this serjeant *Levinz* answered, and it was agreed by the court, that the session extends into both years, but it commenced the 24 October 22 Car. 2. and all acts made refer to the first day of the session, unless it be otherwise provided by the act. So that this is an act of 22 Car. 2. and the printed book is false. 2. Exc. It is not said, that notice was given to the plaintiff, to appear at the sessions; but it is said, that notice was given to *Thomas Jones*, but not to *Thomas Jones* the plaintiff, or *praedict.* so that the court will intend, that it was not to the plaintiff, but to another person. But to this it was answered, and agreed by the court, that if it had been said *cuidam Thomae Jones*, there the court would have intended another person, because *quidam* is the same with *alius*; but since it is *Thomae Jones* generally, the court will intend, that it is the same *Thomas Jones*, of whom mention

22 & 23 Car. 2. c. 20. 2 W. & M. ft. 2. c. 15.

All acts relate to the first day of the session, unless it be otherwise provided by the acts.

Quidam signifies *alius*.

How an exception in an act ought to be pleaded.

Flowd. 410, 65.

Dier 103. b. p. 7.

2 Jo. 50.

2 Vent. 215.

Hob. 227.

10 Rep. Canc' Oxon.

Sid. 24.

Bro. Pleadings, pl. 164.

22 & 23 Car.

2. c. 20. is a publick act.

Judgment general with cesset executio, &c.

mention was made before. 3. Exc. was, That it is said, that the defendant was not imprisoned for 100/. but it is not said, that he was not imprisoned for a fine, therefore he might be imprisoned for a fine, and then he is not dischargeable by the act. *Sed non allocatur.* For, *per Treby* chief justice, the difference is, that where an exception is incorporated in the body of the clause, he who pleads the clause, ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to the adversary to shew the proviso. Therefore this proviso in the present act, being distinct, ought to be shewn by the plaintiff. 4. Exc. It is a private act, and ought to have been pleaded at large, for it does not concern all poor prisoners, but only those who were imprisoned at that time. But it seemed to the court, that it shall be construed a publick act. 1. Because all the people of *England* may be concerned as creditors to these poor prisoners. 2. It is an act of charity, and therefore ought to have a more candid interpretation. 3. It is an act too long and difficult to be pleaded at large, so that it would put these poor people to a greater expense than they can bear, to plead it specially. And *per Treby* chief justice, if the act concerning the bishops were to be adjudged now, it would be adjudged a general act. But, *per curiam*, in this case the plaintiff must have a general judgment at present, with *cesset executio* as to the body, &c. of the defendant; or otherwise the plaintiff may be bound by rule of court, not to sue execution against his body, &c.

Serle *vers.* Darford.

S. C. 2 Lutw. 1435.
Poph. 101.
Mo. 350.

TRespass, for trespass, assault, battery and wounding at *Hamerton* in *Norfolk*. The defendant pleads *quoad* the *vi et armis* and wounding, not guilty; and as to the residue of the trespass, the defendant pleads, that he was possessed of a close at *T.* in the same county, and that the plaintiff entred into the close with a great number of horses, and turned up the soil, that the defendant requested the plaintiff to quit the land; that the plaintiff refused, upon which the defendant *molliter manus imposuit* upon the plaintiff to maintain his possession, which is the assault, &c. and he traverses the assault, &c. at *Hamerton*. The plaintiff replies, and claims a way over the close to *T.* by prescription, and that the defendant *adtunc et ibidem* broke the plaintiff's head, *absque hoc quod defendens molliter manus imposuit modo et forma prout*, &c. The defendant demurs. And serjeant *Wright* took exception to the replication, that there is here a traverse upon a traverse, which cannot

not be. *Sed non allocatur.* For *per curiam*, where the first traverse is taken to the material point, there a traverse cannot be taken upon a traverse. But where the first is not to the material point, there a second traverse may be taken; and in such transitory actions there may be a traverse upon a traverse. *Co. Li.* 282. b. 3 *Cro.* 99. *Inglebath v. Jones.* 407. *Bateman v. Spring.* Then *Wright* serjeant took another exception, that the replication was a departure from the declaration, for the declaration is of an assault, &c. at *H.* and the replication admits that it was at *T.* And he cited 1 *Hen.* 6. 63. *Bro. Departure* 13, 14. 7 *Hen.* 6. 4. 8 *Hen.* 4. 16. *Girdler* serjeant *e contra.* That it is a transitory action, and if the defendant makes it local by his plea, the plaintiff may answer the plea, and it will be no departure. And he cited *Trin.* 13 *Car.* 2. *C. B. Rot.* 795. *Taylor v. Gabetus.* Trespass by executor, *de bonis asportatis in vita testatoris apud East Retford in Nottinghamshire*; the defendant pleaded that *A.* was seised of a place called in *North H.* in the same county, and made a lease thereof to the defendant, by virtue of which he entred, and as lessee he justified the taking of the goods as damage feasant, and traverses the taking at *East R.* The plaintiff replies, that before *A.* was seised of that place, &c. in fee, *J. S.* was seised of the place, &c. in fee, and leased to the plaintiff's testator, who entred and put in his goods, that the defendant of his own wrong took them, *absque hoc* that *A.* was seised in fee prout; the defendant demurred, supposing this to be a departure, but judgment was given for the plaintiff for the reason aforesaid. *Trin.* 23 *Car.* 1. *B. R. Rot.* 517. *Rogers vers. Ashdown.* *Pas.* 3 *Car.* 1. *B. R. Rot.* 933. *Hil.* 1 *Car.* 1. *B. R. Rot.* 706. *Trin.* 1 *Will.* & *Mar.* *B. R. Rot.* 641. all cases in point. And of this opinion was the whole court. For in transitory actions the plaintiff has liberty to lay them where he pleases, and if the defendant makes it local by his plea, the plaintiff may vary in his replication, either in time or place. And *Powell* justice cited 1 *Keb.* 566, 578. *Lee v. Raines.* And (by him) the case of *Taylor* and *Gabetus* is express in point. But (by him) in this case the plaintiff might also have replied, *de son tort demesne*, because the title of the land did not come in question. Judgment for the plaintiff.

Traverse may be after traverse, where the first is immaterial. *Post.* 370.

If the plaintiff in a transitory action in his replication vary from the time or place in his declaration, it is no departure. *Taylor v. Gabetus.* *Ante* 75.

See *Cro. Car.* 228. *De injuria sua propria*, where pleadable?

Nevill vers. Packman.

TRespass, *quare clausum suum fregit vocatum Horn-hill apud S. C. Lutw. parochiam de R. et herbam pedibus ambulando consumpsit et aliam herbam cum averiis depastus fuit necnon oves ipsius the plaintiff ibidem nuper inventas absque rationabili causa fugavit cepit et imparcavit, per quod the sheep were damnified, &c.* The defendant

Traverse of
matter not al-
leged is ill
upon special
demurrer.
Doct. placit.
358.

Ibidem refers
always to the
ville.

dant pleads not guilty to all but the taking and impounding of the sheep; and as to that, he justifies, that he was seized in fee of a place called *Orchards* in R. and took the sheep there damage feasant, &c. *absque hoc* that he took and impounded them *in close praedicto vocato Horn-bill modo et forma* as the plaintiff has declared. The plaintiff demurs specially. And adjudged for the plaintiff, because the traverse is ill. For he traverses matter not alleged; for the plaintiff does not say, that the defendant took the sheep in the close called *Horn-bill*, but he says *ibidem inventas*, which *ibidem* refers to the parish and not to the close. 1. Because *Horn-bill* was the plaintiff's soil, and then the defendant could not impound the plaintiff's cattle in the plaintiff's soil. 2. *Ibidem* is always referred to the *ville*, to the end that the *venue* may come from thence, for no *venue* can come out of a close. But it seemed to the court that this was an idle traverse, and had been surplusage upon a general demurrer; but being here upon a special demurrer, it vitiates the plea. And therefore judgment for the plaintiff.

Allen *vers.* Harris.

S. C. Lutw.
1537.
Accord cannot
be pleaded be-
fore execu-
tion, *contra* of
arbitrement.
1 Ro. Abr.
129.
Bro. Accord,
p. 6.
Dier 359.
75.
Ray. 450.
2. Jo. 158.

Doct. placit.
15.

TROVER for a waistcoat. The defendant pleads, that the plaintiff, in consideration that the defendant at the special instance of the plaintiff assumed to pay to the plaintiff 20 s. agreed to discharge the defendant of this trover, &c. and lays mutual promises to perform, &c. The plaintiff demurs. *Girdler* serjeant for the defendant. The old rule was, that an accord with satisfaction ought to be pleaded executed, that the plaintiff might be sure of something for his damages; but an arbitrement may be pleaded without performance, because the parties may have reciprocal remedies. Then it being now settled, that the parties may have actions upon mutual promises, this accord may be pleaded, though not executed, because each party may have his remedy. 2 *Jones* 158. *Raym.* 450. *Case v. Barber.* 2 *Jones* 168. *Wickham vers. Taylor.* *Sed non allocatur.* For, *per curiam*, if arbitrement be pleaded with mutual promises to perform it, though the party has not performed his part, who brings the action, yet he shall maintain his action; because an arbitrement is like a judgment, and the party may have his remedy upon it. But upon accord no remedy lies. And the books are so numerous, that an accord ought to be executed, that it is now impossible to overthrow all the books. But if it had been a new point, it might be worthy of consideration. Judgment for the plaintiff. See 15 *Hen.* 6. *Accord* 1. 3 *Cro.* 304. *Balston vers. Baxter.* *Hil.* 7 *Edw.* 4. p. 6. *Stile* 245, 252.

Robinson

Robinson *vers.* Godsalve.

UPON motion for a prohibition to stay a suit in the bishop's court, upon suggestion that the party lived within a peculiar archdeaconry. Resolved, *per curiam*, Where the archdeacon has a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there and hold court. And in such case if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted. For the statute intends, that no suit shall be *per saltum*. But if the archdeacon is not a peculiar, then the bishop and he have concurrent jurisdiction, and the party may commence his suit, either in the archdeacon's court or the bishop's, and he has election to chuse which he pleases. And if he commence in the bishop's court, no prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there.

If a man living in a peculiar archdeaconry be sued in the bishop's court, a prohibition shall be granted.
Cro. Ja. 556.
2 Mod. 65.
Skin. 589.
6 Mod. 308.
11 Mod. 6.
13 Rep. 4. b.
5 Mod. 451.
Gibb. 110.
Vent. 233.
Godolph.
Rep. 119.
Ro. Rep. 329.

Bedam *vers.* Clerkson.

DEBT upon bond dated the fifth of April 4 Will. 3 Mar. conditioned, that if the defendant should perform the award of J. S. of all actions and demands, *ita quod* the award be made and ready to be delivered by three of clock *post meridiem* 6 April (which was the next day) that then, &c. The defendant pleads, that J. S. *nullum fecit arbitrium de praemissis ante tertiam horam praedict. diei in conditione praedicta specificat*. The plaintiff replies, and shews that J. S. made an award after the entering into the bond, *et ante tertiam horam praedict. diei post meridiem, viz. undecima hora*, that the defendant should pay to W. the plaintiff's solicitor, 28 s. and that the defendant should pay to the plaintiff upon the 14th of April 81. and that he should deliver to the plaintiff *quoddam scriptum obligatorium, vel quandam billam obligatoriam, quod prius habuisset, quodque adtunc alteruter eorundem faceret alterutri eorum generales relaxationes, &c.* and then assigns for breach, that the defendant did not pay to the plaintiff the 81. The defendant demurs. Serjeant Birch for the defendant argued, that the award is not good. For the award to pay 28 s. to W. who is a stranger, is ill, except in some cases, where it appears that it is for the plaintiff's benefit, or to discharge money owing by him; but nothing of that appears in this case, and therefore as to that the award is ill. *Quod curia concessit.* 2. Exc. The award is, that the defendant

Ro. Abr. 249.
Bro. Arbit.
p. 31.

Award to pay money to a stranger is ill, unless it be to discharge a debt, &c. owing by one of the parties.

Award to deliver quoddam scriptum, ill for the uncertainty.

Exposition of sentences.

Alteruter.

Replication makes a vicious plea good.

defendant should deliver to the plaintiff *quoddam scriptum, &c.* which is altogether uncertain, for it does not say of what sum the bond was, nor of what penalty, nor of whom it was obtained, and therefore it is void for the uncertainty in that respect; *quod curia concessit*. Then he argued, that it was an award but of one side, and consequently ill; for the releases cannot be performed until the bond be delivered to the plaintiff, which can never be, because it is uncertain what bond is meant, and the releases cannot be executed till the bond is delivered to the plaintiff, for the words of the award are, that the defendant should deliver to the plaintiff *quoddam scriptum obligatorium, &c. quodque adtunc* they should execute general releases on both sides. Now the *adtunc* shews, that the releases should not be executed, until the bond should be delivered to the plaintiff. So that the arbitrator has awarded, that the defendant should pay to the plaintiff 8*l.* which is all of the award that is good, and so it is an award of one side. *Sed non allocatur*. For *per curiam*, the *adtunc* refers to the 14th of April, and not to the delivery of the bond to the plaintiff; so that the award is mutual enough, for when the defendant has paid the 8*l.* he may demand a general release. 4 Exc. That *alteruter* is uncertain, viz. one of the two. But *per curiam*, it is as good a word as one can use. Wright serjeant for the plaintiff took exception, that the plea was ill. For the defendant pleads, that the arbitrator made no award *ante tertiam horam praedicti diei*; now there are two third hours, and perhaps the award was not made before the first third hour, and yet it might be made before the third hour *post meridiem*; and therefore the defendant ought to have said, *ante tertiam horam praedicti diei post meridiem*, for want of which *post meridiem* the plea is ill. And *per curiam*, this had been ill, if the plaintiff had demurred for it; but now it seemed to them, that the replication had made it good. But because the award was mutual enough, and a good breach assigned, judgment for the plaintiff.

Trench executor of Squire *vers.* Trewin.

In case of reciprocal covenants, one party may have his action, before he has performed his part.

Keb, 178.
12 Mod. 1.
3 Salk. 108.
8 Mod. 294.

Covenant upon articles of agreement between the testator Squire and the defendant, by which it was covenanted and agreed between them, that Squire should assign to the defendant his interest in a house, &c. and that the defendant should pay to Squire 30*l.* The plaintiff assigns for breach, that the defendant has not paid the 30*l.* &c. The defendant pleads, that Squire did not assign his interest in the house to the defendant. The plaintiff demurs. And adjudged for him, because these are mutual and independent covenants, and the parties may have reciprocal actions; and therefore the plaintiff may bring his action before the assignment

ment of the house. And the defendant has a remedy after, if the other party does not perform his part.

Sheffield v.
Styles, Mich.
7 Ann. 6 Viner
Covenant 437.
P. 5.

Green and fifteen others *against* Pope.

Intr. Hil. 7 Will. 3. C. B. Rot. 307.

Green and fifteen others bring an action upon their case against s. c. 3 Lev. the defendant, for having made a false return to a *mandamus* 363. to him directed. The plaintiffs in their declaration shew the act 1 Will. & Mar. st. 1. cap. 18. which exempts the protestant dissenters from the penalties of divers former acts, if they take the oaths and subscribe the declaration there mentioned; and by that act it is enacted, that no meeting by protestant dissenters for religious worship shall be allowed, until the place for the meeting be certified unto the bishop of the diocese, or the archdeacon, or to the justices of peace at the general quarter-sessions, and registered or recorded there respectively, and a certificate thereof given without fee, &c. and the plaintiff shews, that they were protestant dissenters, and had taken the oaths, and subscribed the declaration, according to the act; and that in the parish of *Hindley*, at a town called *D.* within the diocese of *Chester*, the plaintiffs had appointed a place called *The chapel* for their religious worship, and that they had authority to do so; that *Green* one of the plaintiffs made a certificate of their appointment of this place to the bishop of *Chester*, and delivered it to *Pope* the defendant, being register to the bishop, to register it as he ought; that the defendant *Pope* refused to register it; upon which the plaintiffs were driven to sue a *mandamus* out of the King's Bench, directed to the defendant, commanding him to register the certificate; but that the defendant notwithstanding did not register it, but made return to the *mandamus*; that *Hindley* was an antient populous village, distant one mile from the parish church, and for these forty years last past this place called *The chapel* had been, and yet is, a chapel of ease, and indowed with 50*l.* per annum, and had a minister appointed to officiate; and that there were several places within the parish already appointed for dissenters for religious worship, &c. all which return the plaintiffs aver to be false; and for this false return they bring this action. The defendants plead, that the return to the *mandamus* was true, and aver every particular of this return, &c. The plaintiffs demur. And, 1. it was resolved, that this plea was bad, because it amounts but to the general issue, it being all meer matter of fact, and having no intermixture of law. Then *Birch* serjeant for the defendant argued, that judgment ought to be given for him, 1. Because it is said in the declaration that the plaintiffs appointed the

Mandamus directed to the register of a bishop, commanding him to register the certificate of a place for meeting of dissenters according to 1 Will. & Mar. st. 1. cap. 18.

General issue.

A field may
be called *The*
chapel.

Mandamus
will not lie
for enjoyment
of a seat in the
church.

Where per-
sons are joint-
ly intituled to
an action,
they may join;
contra where
the damages
are several.
Trespas.
Case for
words.

Several alder-
men disfran-
chised cannot
join in *manda-
mus*.

the place, but the act gives no direction, who shall have authority to appoint the place; and therefore it ought rather to be done by the preacher, or otherwise with the consent of the whole meeting. 2. They have no authority to appoint a chapel, but this place in the declaration they call a chapel. But to this the court answered, that a field or tavern may be called *The chapel*. 3. They should have shewn, by whom this appointment was made, as by the dissenters inhabitants within such a town, &c. but it is so general here, that it may be by all the dissenters in *England*. Then if it is no good appointment, the whole will fail; for then there will be no certificate; if no certificate, no registering: if no cause to register, the refusal was no ground for a *mandamus*; if no *mandamus*, then there can be no false return. 4. It is said that the certificate was made by *Green* alone; but the act gives no authority to any one in particular, to make it. But *per Treby*, the act being general, any of them may well certify. 5. The *mandamus* in this case was not grantable, for there was here no disturbance of a freehold, nor office of trust, but a thing meerly ecclesiastical. And if a man has a seat in a church, and is hindred of the enjoyment, no *mandamus* lies; and as to the plaintiffs this was in nature of a church. But to all these objections the court gave one general answer, that this action was brought for the false return to the *mandamus*, and therefore all the rest is but inducement. And therefore whether a *mandamus* will lie or not, is not now before the court, but it must be taken *pro confesso*, that a *mandamus* was granted, and the defendant made a false return. The principal point therefore of the case was, whether the plaintiffs can join in this action, or not? And this was several times argued at the bar. And the defendants council argued, that they could not. Because that where persons are jointly intituled to the action, they may all join in it, since the damages, which were the foundation of it, were joint. *Cro. Car.* 443, 437. 7 *Hen.* 6. 42. 14 *Hen.* 6. 13. 31 *Affis.* pl. 49. 34 *Hen.* 6. 12. b. 30. 35 *Hen.* 6. 19. But where persons are severally damnified, as in trespass, &c. there they cannot join. Therefore if *A.* and *B.* are in company, and *C.* says of them, that they are felons, they must sue distinct actions, and cannot join. *Dier* 19. And upon this ground is *Fitzb. Nat. Br.* 76. b. *Dier* 351. If two are sued in the spiritual court for slander, and they procure a prohibition, and the plaintiff in the spiritual court proceeds afterwards, yet they cannot join in an attachment upon prohibition. *Bro. Joinder in action* 30. If a corporation by act of common council disfranchise several aldermen, they cannot join in a *mandamus*, because their interests are several. Now in this case the damages are several, for some will come to this meeting house, and others not; then they only who come, and have not a seat, are damnified, and not they who absent themselves.

selves. Besides that, if *A.* has not a seat, this is no damage to *B.* and so *vice versa*. Then the damages here being several, the plaintiffs ought not to have joined in this action. But it was adjudged by the whole court upon great deliberation, that the plaintiffs might well join, for the damages in this case were joint; for they all jointly sue the *mandamus*, they all jointly prosecuted, the charges were all joint, and these are the damages the plaintiffs sue to recover. And by *Treby* chief justice, if the attorney sues the plaintiffs for the charges of the suit of the *mandamus*; he must sue them jointly, and the survivors are liable. And tho' it was objected, that the plaintiffs had no need to join in the suit of the *mandamus*, yet (the court answered) since they have done it, the charges will survive. And by *Powell* justice, the reason of the case where two join in prohibition, &c. will guide this case. Now if *A.* libels against *B.* and *C.* for tithes; *B.* and *C.* procure a prohibition; afterwards *A.* proceeds in the spiritual court; *B.* and *C.* shall join in the attachment upon the prohibition. *Ow. 13. Bartue's case.* So (by him) *A.* libels against *B.* and *C.* for defamation, and they sue a prohibition, they shall join in attachment upon it; and it is no objection to say, that the defamation was several, for that might be objected in the case of tithes, and yet there they should join. See 8 *Affis. p. 30.* But if *A.* exhibits several libels against *B.* and *C.* there *B.* and *C.* cannot join in prohibition. 1 *Leon. 286. Gerrard v. Sherrington. Yelv. 129. Burges and Dixon v. Ashton. Noy 131.* But the whole court principally relied upon a case adjudged in this court, *Mich. 4 Will. & Mar.* where the two church-wardens of *Chelsea* church, being elected by the parish by custom, went to Dr *Brampston* the official, to be sworn; Dr. *Brampston* refused to administer the oath to them; upon which they sued a *mandamus* directed to Dr. *Brampston*, to command him to administer the oaths; upon which he returned, that the custom was, that the minister should name one church-warden, and that the parish should chuse the other; and because that the parish had elected two, he did not know, which of them he ought to admit; they brought jointly case against Dr. *Brampston* for this false return; and exception was taken, that the damages were several, and the profits of the offices several; but to this it was answered, that the action was not brought, to recover damages for the profits of the office, for the office had no profits; but it was brought, to recover the damages and charges expended in the suit of the *mandamus*; and for this reason it was adjudged, that they might well join; which does not differ from the principal case. But to make a distinction between these two cases, it was objected, that the church-wardens might well join, because they are a corporation in judgment of law, and may sue for goods of the parish, which are taken out of their possession, or may have

Sixteen join in
 suing a *man-*
damus, a false
 return is
 made, they
 shall all join
 in case for the
 false return.

Sixteen join in
 suit of a *man-*
damus, the at-
 torney shall
 sue them all
 jointly for the
 charges.

A. libels joint-
 ly against *B.*
 and *C.* for
 tithes or defa-
 mation, *B.* and
C. may join in
 prohibition.
 Contra if *A.*
 sues several li-
 bels.

Church-war-
 dens of *Chel-*
sea v. Dr.
Brampston,
 3 *Lev. 362.*

Sixteen sue a
mandamus, all
ought to join
in suing a pe-
remptory
mandamus.

Mandamus
granted in
B. R. case for
false return
sued in C. B.
B. R. will not
grant a pe-
remptory
mandamus.
2 Salk. 428.
Comb. 400.

have trespass, or appeal of robbery, for the goods of the parish, 12 Hen. 7. 27. which distinguishes them from this case, which was of common persons. But to this the court answered, that church-wardens are not a corporation, till they are admitted; but this *mandamus* was sued, to procure admittance, and consequently then they were not a corporation. And (*per curiam*) this action is not brought, only to recover damages, but also to have a peremptory *mandamus*, in which all ought to join. For one of them cannot have a peremptory *mandamus*, where sixteen joined in the principal *mandamus*, for the peremptory *mandamus* must pursue the principal. And *per Treby* chief justice, if the one sues an action for a false return, and has a verdict for him; and the other sues an action, and has judgment against him: the court will be in doubt, whether they shall grant a peremptory *mandamus* or not. And for these reasons all the court were of opinion, that the plaintiffs might well join. And therefore judgment was given for the plaintiffs. Upon which *Pemberton* serjeant moved in B. R. for a peremptory *mandamus*; but the King's Bench denied to grant it; because the peremptory *mandamus* says, that the Return is false, *prout constat nobis per recordum*, which cannot be said here; for the King's Bench cannot take judicial notice of the record of the common pleas, unless it come before them by course of law; and therefore the action for the false return should have been brought in the King's Bench, where the false return is, if the party designed to have a peremptory *mandamus*.

Brown *vers.* Berry.

Defendant
pleads in a-
batement, no
original, and
concludes in
abatement,
bar, and to the
jurisdiction.

1 Salk. 5.

CASE. The defendant pleads in this manner, *et praedict.* the defendant *venit et petit judicium de narratione praedicta*, because he saith, that he was a prisoner in the *Fleet*, and brought to the bar by *habeas corpus*, and charged with the declaration, *et ulterius pro placito dicit*, that there was no original sued against him, *ideo petit judicium quod narratio cassetur, et quod curia cognoscere non velit, et quod querens ab actione sua praedicta pracludatur.* The plaintiff demurs. And the defendant joins in demurrer, and concludes his joinder in demurrer in the same manner as he had concluded his plea. But *per curiam*, though where a plea in abatement is pleaded in bar, final judgment shall be given; yet in this case the defendant having concluded in abatement, bar, and to the jurisdiction, it shall be taken as pleaded in abatement. But it is not a good plea in abatement, and therefore *respondeat ulterius* was awarded.

Dawson

Dawson *vers.* Howard.

IN ejectment the jury was charged with the evidence, and afterwards the lord chief baron *Ward*, being judge of assize at *Cum-berland* where it was tried, upon the petition and consent of both parties made a rule, that the cause for difficulty should be adjourned into the bench, and that the jurors should appear in bank at the day of *tres Mich. sub poena 50l.* to give their verdict between the parties, *si justiciariis ita placuerit.* And *Pemberton* serjeant moved, that this should be made a rule of court. But denied, because the judge could not adjourn the jury, after they were sworn and charged with the evidence, nor could inflict a penalty upon the jurors.

A jury cannot be adjourned after they are sworn.

Scoles *vers.* Lowther.

Lowther is parson of the parish of *Swillington*, and Mr. *Scoles* lives in *Kippax* the next adjoining parish, and occupies a large parcel of arable land there, and has forty acres of meadow and pasture in *Swillington*, and four acres of arable land. *Lowther* libelled in the spiritual court of *York* against *Scoles* for tithes of the cattle depastured in *Swillington*. *Scoles* upon a suggestion, that barren cattle kept for plowing the land, and cattle for the pail for the use of the house, ought not by law to pay tithes, and that this cattle, for the tithes whereof *Lowther* now libels, is such, moves for a prohibition. And it was granted to him *nisi, &c.* And now serjeant *Pemberton*, upon affidavit, that *Scoles* carried the milk of his cattle to his house in *Kippax*, and used it there, and that he made use of the dry cattle for ploughing his land in *Kippax*, moved that the rule might be discharged. And it was resolved by the whole court, that the defendant *Lowther* should have tithes of the milk. For though *Wright* serjeant objected, that if a man have arable land without a house, he is intitled to be discharged of the tithes of the milk, which maintains the servants, who plow the land, as well as if he had had a house, in which the milk were spent; yet the court answered, 1. That the law was otherwise, for it is of the same nature with wood which is burnt in the house, which is exempt from the payment of tithes, only so long as it is burnt in the house. So the law is in the case of milk, which is only discharged of tithes because it is used in the house. And *per curiam*, of common right tithe milk is payable at the parsonage or vicarage house. 2. As to the tithes for the agistment of the barren cattle, the court said, that if in this case there had not been any

Milk is only discharged of tithes whilst it is spent in the house. The same law of wood.

Tithe milk is payable at the parsonage or vicarage house of common right. *Bunb. 73. contra. Bunb. 20.*

Benb. 3.
Cattle of the
plough are ex-
cused from the
payment of
tithes, in re-
spect that they
till the arable
land.

Wood to fence
arable land,
excused of
tithes.

A. has lands
in the parishes
of B. and C.
if the cattle
plow both
these lands,
they shall pay
tithe.

See 2. Rayn.
on Tith. 546.

Uberiores deci-
mae, what?

arable land in *Swillington*, it is without doubt, that the parson ought to have had tithes. For the reason why cattle of the plough is excused from the payment of tithes is, because they are employed for the improvement of the arable land in the same parish, by which the parson has better tithes of the arable land; but here that reason fails, for the parson of *Swillington* has no tithes of the land in *Kippax*. In the same manner where a man has wood in one parish, and arable land in another; if he makes use of this wood in making fences for his arable land, yet he shall pay tithes to the parson where the wood grows. But it had been otherwise if it had been the same parish. The same law, where the wood grows in one parish, and is spent in the owner's house in another parish. Now then the question here will be, whether the plowing of these four acres of land in *Swillington* will excuse this cattle from the payment of tithes? And *per curiam*, it will excuse only those cattle which only plow that land of the four acres, and not those which plow any land in *Kippax*. For the parson ought to have something in lieu of the loss of those tithes, which can only be of the four acres in *Swillington*. Then *Powell* justice took exception to the suggestion, where the plaintiff suggests, that this barren cattle plow the land, &c. but does not say, *per quod* the parson had *uberiores decimas* in another place. And (by him) *uberiores decimae* does not signify only, that the parson will have better tithes out of the arable land, than he would have had, if the cattle had not plowed it; but it signifies, that he will have so much more tithes (than otherwise he would have had) as will fully recompense the loss of the tithes of the cattle; or it will (as he expressed it) overweigh that loss. But as to this signification of *uberiores Treby* chief justice doubted much. But in the principal case a prohibition was granted, *quoad* this cattle, which only plowed the land in *Swillington*. And as to the rest, *Lowther* had liberty to proceed below.

Wade *vers.* Baker and Cole.

Intr. Hil. 7 Will. 3. C. B. Rot. 447.

Ro. Abr. 499.
Ow. 115.
Godb. 143.
Cro. Jac. 55.
98.
4 Leon. 238.
Supplement to
Co. Comp.
Cap. 82. f. 17.
2 Wms. 127.
New Abr.
684.

REplevin of twelve cows distrained by the defendants at a place called *Hobarts* at *Peason Hall* in *Suffolk*. The defendants make conusance as bailiffs to *Daniel Sanfon*, and shew, that the place where, &c. was called *Hobarts*, and was customary, parcel of the manor of *Peason Hall*, held by copy of court roll; that *John Brown* the elder was seised in fee of the place where, &c. held at the will of the lord, according to the custom of the manor; and that being so seised he died, whereby the land descended to

John Brown his son and heir, who was under the age of fourteen years; that within this manor there is, and time whereof, &c. hath been a custom, that if tenant in fee according to the custom of the manor die seised of the lands held at the will of the lord, leaving his son under the age of fourteen years, that then, immediately after the death of such tenant, the lord of the manor shall have the custody of the land, until the heir come to the age of fourteen; and that the lord himself, or by his steward, may assign to such infant a guardian for these lands; that before the taking of this distress *F.* was seised of the manor in fee, and being so seised, at his court of his said manor the 23d of May 1695 by *William Bates* his steward granted by copy of court roll the place where, &c. to *John Brown* and his heirs, who was then admitted, and granted the custody of the place where, &c. to *Daniel Sanson*, until *John Brown* should come to the age of fourteen years; that *Daniel Sanson* entred as guardian into the place where, &c. and therefore was and yet is possessed; and the defendants as bailiffs to him took the cattle damage feasant, &c. The plaintiff pleads in bar of the conusance, that *Anne Brown*, mother of the said *John Brown*, after the death of her husband entred into the place where, &c. as guardian in socage to her said son *John*, and made a lease thereof at will to the plaintiff, who entred and put in his cattle, &c. The defendant demurs. And adjudged, 1. That the bar to the conusance was ill, because the mother could not be guardian in socage, because there is here a particular custom for the lord to have the custody, which custom is not denied. But then it was objected by the plaintiff's counsel, that the conusance was ill; for the defendants make conusance as bailiffs to *Sanson* in the right of *Sanson*, whereas the guardian in socage has no right in him; but it ought to be in right of the copyholder infant. And it was compared to *Hob. 215. Hut. 16.* where it is adjudged, that the committee of a lunatick cannot bring *trover* for goods taken from off the lunatick's land. *Cox v. Dorston. Sed non allocatur.* For *per curiam*, guardian in socage may bring trespass or ejectment in his own name. He may make a lease of the land in his own name, until the infant come to the age of fourteen. And he may make admittances of copyhold estates in his own name. 2 *Cro. 98. Shopland v. Rider. Plowd. 193. 7 Edw. 3. 44. Keilw. 46. 15 Hen. 7. 13. 2 Roll. Abr. 41. Owen 15.* And such customary guardian shall follow the nature of a guardian at common law. The second exception to the conusance was, that the defendant hath pleaded, that *John Brown* the father was seised according to the custom of the manor in fee, but in law it is only an estate at the will of the lord, and consequently a particular estate, and then the commencement of it ought to be shewn; and therefore the defendant should have shewn the grant to *John Brown*, or otherwise should have laid an admittance, which

Guardian in socage may bring trespass or ejectment, or make leases, until the ward come to the age of 14, or make admittances of copyholds, or avow in his own name.

which would have amounted to a grant. 4 Co. 22. b. But to this *Levinz* and *Birch* serjeants for the defendants answered, 1. That the title of the lands did not come in question, but only a collateral matter, viz. the custody of the lands. 2. They confessed, that the heir might well plead his ancestors admittance as a grant, because he is privy to his Estate, and has the surrenders and copy of the admission in his custody; but the guardian is a stranger to these transactions, and does not know the former admissions; and therefore it cannot be supposed, that he can plead the admission of *John Brown*, since it is out of his consueance. 3. They said, that the lord has admitted the dying seised of *John Brown* the elder, and the descent to *John Brown* the younger, for otherwise he could not have granted the custody. 3. That which they principally urged, was, that the seisin of the father was but only inducement, the title being made to the guardianship and not to the land; then when matter is shewn but as inducement to other matter, it has no need to be shewn so precisely, as the *git* of the action ought to be. 1 Leon. 123. 3 Cro. 132. 1 Cro. 138. Yelo. 16, 56, 75. 3 Cro. 112. And of this opinion *Powell* justice seemed to be at the first; but afterwards, *mutata opinione*, he and *Treby* chief justice held the consueance ill for this exception; for it is not bare inducement, but the very ground of the avowants right. For if *John Brown* was not seised, and died seised, and the land descended to his son; then the lord will have no title by the custom to have the guardianship, and consequently no more will *Sanfon* have any right. Therefore the seisin of *John Brown* the elder was the ground of the avowants right, and might have been traversed; which proves that it is not inducement, for inducement is never traversable. But as to the objection that was made, that the lord has disabled himself to take advantage of the custom by having made a grant to the heir, the court answered, that this was but an admittance, which is generally pleaded in this manner. And for this reason judgment was given for the plaintiff by *Powell* justice, and *Treby* chief justice, *Nevill* justice *dubitante* upon the authority of the case of *Scavage* and *Hawkins*, *Jones* 453. which case he said seemed to be contrary to the resolution of the other judges.

Inducement
what?

He who pleads
a copyhold
ought to shew
the beginning
of the estate.
Adjudged in
B. R. Mich.
6 Will. &
Mar. 1694.
Robinson v.
Smith. Intr.
Trin. 6. Rot.
192.

Clench v.
Cudmore.
Lutw. 1181.
3 Lev. 395.
12 Car. 2.
cap. 24.
Parent cannot
bar the lord of
a copyhold
manor of the
guardianship
of an infant by
his devise.

Note: In the argument of this case of *Wade* and *Barker* a case was cited as adjudged in this court between *Clench* and *Cudmore*. Intr. Pas. 3 Will. & Mar. C. B. Rot. 304. where *Cudmore* lord of the manor of *Coxhall* in *Essex* claimed the custody of the copyhold lands by the custom (whereof the copyholder died seised) as guardian, and the plaintiff claimed as guardian appointed by the will of the copyholder according to 12 Car. 2. cap. 24. until the son should arrive at the age of one and twenty years. And adjudged for the lord, that this customary right was not taken away by

by the general words of the act; and that the copyholder could not appoint a guardian for his son till the age of twenty one years by that statute, because the statute extends only to lands and tenements at the common law.

Helyng *vers.* Jennings in scaccario.

*T*Rover *pro uno vestimento lineario pro pueris, Anglice* a suit of childbed linen, *pro uno cbirographo, Anglice* a muff. Verdict for the plaintiff, and judgment after motion in arrest. *Ex relatione m'ri Mather.*

Loggin *vers.* Comitem Orrery C. B.

COvenant. The plaintiff declares upon a deed, by which it was covenanted and agreed between the plaintiff and defendant, that the plaintiff should deliver to the defendant his mare, and that the defendant should pay to the plaintiff twenty guineas at the day of the death of the countess of Orrery the defendant's mother, or at the day of marriage of the plaintiff, which of the two should first happen; and he avers, that he delivered the mare to the defendant, and that he was married such a day, and that the defendant had not paid, &c. Judgment by default, and writ of inquiry of damages executed. And now Girdler serjeant moved in arrest of judgment, that the plaintiff has not averred, that the countess of Orrery was not dead, which he ought to have done, because the guineas were to be paid at the contingency that should first happen; so that if the countess of Orrery died before the plaintiff married, the plaintiff has slipped his opportunity. See *Yelv. 175. Rock v. Rock*. Besides, that if she was dead before the plaintiff married, the plaintiff might have sued his action, and the recovery in that action would not be a bar here. *Sed non allocatur*. For *per curiam*, in such case the defendant might well plead that recovery in bar; and though the plaintiff was intitled to his action upon the first contingency, if he tarry till the second happen, it is but in his own delay, and the defendant shall not take advantage of it. Judgment for the plaintiff.

A. covenants with B. to pay 20 l. at his marriage, or when J. S. shall die, which shall first happen, though B. brings no action when J. S. dies, he may when he afterwards marries.

Walker v. Brook executor. Brook.

INdebitatus *assumpsit* was brought against the executor upon the *assumpsit* of the testator. The plea roll was, that the testator *non assumpsit*; but the *postea* was, that the defendant *non assumpsit* *Comyns 376.*

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generally, and verdict for the plaintiff: And moved, that the plea might be amended. And it was granted, for *per curiam*, the jury have found the defendant guilty as the plaintiff has declared, which is upon a promise of the testator, the plea roll being right. But if the defendant had pleaded *quod ipse non assumpsit*, a replender ought to have been granted. See 2 *Ventr.* 196.

Replender.

Recovery amended.

It is every day's practice to amend recoveries by the deed to lead the uses. 2 *Barnes* 21.

Serjeant *Pemberton* moved for liberty to amend a recovery suffered by *Jane Knight*, the lands being said in the recovery to lie in *parochia sancti. Mariae Salvatoris in Southwark*, whereas there is no such parish, for the proper name is *sancti Salvatoris*. And the court gave him leave to raise the word *Mariae*. And *per Treby* chief justice, the vulgar name is *St. Mary Overree*, that is, over the river; but *sancti Salvatoris* is the name used in pleadings.

Hilary

Hilary Term

8 & 9 Will. 3. B. R. 1696.

Sir John Holt Chief Justice.

Sir Thomas Rokeby

Sir John Turton

Sir Samuel Eyre

} Justices.

Memorandum, Mr. serjeant Wright, having been council for the King against Sir John Fenwick in the house of peers, was before the beginning of this term made King's serjeant and knighted.

Jones vers. Bodeenor.

AN attorney of the common pleas being arrested in the country at the suit of an attorney of the King's Bench, gave bail in the King's Bench, which was filed, and then a declaration by the by was delivered against him the same term at the suit of another man, to which he pleaded his privilege. And it was resolved, 1. That though *A. be in custodia marescalli marescalciae* at the suit of *B.* yet when *B.* declares against *A.* *A.* may plead his privilege, because he comes here by coercion, and had no opportunity before, to take advantage of it. See 22 Affis. 83, 4. and 26 Hen. 6, 7. Conusance may be demanded, though a man be in custody of the marshal. *Pari ratione* he may plead his privilege. 2d Resolution. If *A.* files bail at the suit of *B.* and in the same term a declaration is delivered against *A.* at the suit of *C.* *A.* may plead his privilege against *C.* as well as against *B.* for it were absurd, that *C.* who tops his suit upon the action of *B.* should have more liberty or advantage against *A.* than *B.* himself had.

S. C. 1 Salk. 1.
5 Mod. 310.
1 Salk. 173.
Carth. 370.
3 Lev. 343.
Privilege.

A man in custody may plead his privilege, either against him at whose suit he is in custody, or against another man.

Conusance demandable by a man in custodia marescalli.

Contra if he had. But if by any thing *A.* waives his privilege in the first action, he is then obnoxious to the suits of every body, notwithstanding his privilege. 3. Resolved, that if after the defendant has waived his privilege, he shall yet plead it, the plaintiff in his replication must shew his waiver, and rely upon the estoppel. If the defendant pleads his privilege after must shew his waiver, and rely upon the estoppel. waiver, the plaintiff must shew the waiver, and rely upon the estoppel.

Partridge *vers.* Ball.

S. C. Carth. 390. **E**jectment for lands in *Suffolk* upon the demise of the corporation of *Bury*. Upon not guilty pleaded, a verdict was given for the plaintiff. But it was moved in arrest of judgment in *C. B.* that it does not appear upon the record, that the lease was by deed. And the pronotaries there certified, that the practice was, notwithstanding the common rule, of confessing lease, entry, and ouster, in ejectment for things incorporeal as tithes, or upon demises of corporations, to lay the demise by deed. But it was adjudged in *C. B.* that it was aided by the verdict. And judgment was given there for the plaintiff. Upon which error was brought in *B. R.* and that judgment was affirmed. And *Holt* chief justice said, that at this day the case of 2 *Cro.* 613. is not law. *Swadling v. Pier.* For now ejectments are grounded on fiction.

The case of the sheriff of Essex.

Gaol.

THE old sheriff quitted the office without having delivered the gaol to his successor, and the justices of peace, pretending title to keep the custody of it, exclude the new sheriff. Upon which a motion was made to the King's Bench on behalf of the new sheriff. And the court held, that the custody of the gaol could not belong to any but to the new sheriff. Upon which they made a rule, that the old sheriff should deliver the custody of the gaol to the new sheriff, without taking any notice of the justices of peace. And because that the old sheriff was out of possession, the court gave order that this rule should be served upon the gaoler, to the end that he should permit the old sheriff to make delivery of the gaol over accordingly. And (*per Rokeby* justice) the county gaol is the prison for malefactors, and the sheriff ought to keep them there; but prisoners for debt, &c. where escape lies against the sheriff for their escape, may be kept in what place the sheriff pleases.

Hicks *vers.* Woodson.

IN attachment upon prohibition the plaintiff declared, that there is, and time out of mind, &c. hath been, a custom within the hundred of *Huntspittle*, in the parish of *Huntsbitch* in *Somersetshire*, that every occupier of land within the hundred should be discharged of tithes of agistment of barren cattle, not imployed in the plough, nor for the pail, that the plaintiff was an inhabitant for five years passed, and yet is, within the hundred, and occupies land there, and was and yet is possessed of divers barren cattle, for the tithes of which (notwithstanding the said custom) the defendant libelled against the plaintiff, in the spiritual court, &c. and he declares also upon two *modus's* for tithes of lambs, &c. and that the defendant sued for tithes of them, &c. The defendant traversed the *modus's* and the custom, and verdict for all was given for the plaintiff. And upon motion in arrest of judgment by serjeant *Gould*, that this custom was void, the question was, whether a hundred may prescribe generally in a *non decimando*, as in this case, to be free from the payment of tithes for herbage or agistment of cattle. And after several arguments at the bar it was resolved, 1. That in things tithable by custom only, and not *de jure*, a county or hundred might prescribe in *non decimando*, generally; for in that case the county, &c. is discharged without a custom to the contrary; so that it is but to insist upon the old right, against which the custom has not prevailed. See 13 Co. 12. 1 Roll. Abr. 653, 654. 1 Roll. Rep. 22. 2 Bulstr. 185. March 25. But for things which are tithable *de jure*, a county or hundred could not prescribe in *non decimando*, no more than a particular person; for it would be absurd to say, that a hundred shall prescribe in *non decimando*, where the particular persons, of which it consists, could not. 2. They resolved, that wood is not *de jure* tithable, because it does not renew annually. Seld. 237. 3 Co. 13. where it is said, that in libels in the spiritual court for tithes of wood they allege a custom. (But note, the practice of the spiritual court was affirmed at this day to be otherwise; but the court did not regard that, for *Holt* chief justice said, that they made stones, gravel, and all things, tithable.) And therefore the case in March 25. 1 Roll. Abr. 643, 4. may be good law, for the case there is of wood. But this principal case is of agistment of cattle, which is *de jure* tithable, as being recompensed by the grass, &c. which otherwise would yield tithes; and therefore the custom is void. And the court did not only arrest the judgment, but caused this entry to be made, *quia apparet curiae domini regis*,
N n &c.

8. C. 4 Mod.

324, 336.

8kin. 560.

Carth. 392.

Salk. 655.

8. C. Blen-

cow's MS. Re-

ports 64.

Comb. 404.

8. C.

Bunb. 61. pl.

103.

Lit. Rep. 151.

In what things

a hundred

may prescribe

in non deci-

mando.

Doct. & Stud.

166.

Wood was not

de jure titha-

ble.

Stat. de Silva

cadua 45. E.

3. cap. 3.

That wood is

tithable, see

Reg. 44.

Littlet Rep.

151, 2.

3 Init. 643.

Palm. 37, 38.

2 Ro. Rep.

122.

Ec. quod custuma praedicta, Ec. nullius est vigoris, ideo consultatio, Ec.

For the defendant these books were cited in this case. *Bro. dismes* 13. *Doct. et stud. lib. 2. c. 55.* *Plowd. 645.* 1 *Roll. Abr. 653.* *pl. 8.* *Hob. 297.* 2 *Co. 44.* 8 *Hen. 7. 1. b.* 1 *Sid. 447.* For the plaintiff, 1 *Sid. 321.* 13 *Co. 12.* *Dier 363.* 2 *Bulstr. 285.* *March 25.* 2 *Saund. 145.*

Rex *vers.* Martin Rice.

S. C. Carth. 393.
5 Mod. 325.
Carth. 118.
12 Mod. 116.
Comb. 417.
Vent. 267.
8. Mod. 325.
Stoughton v. Reynolds,
Trin. 1736.
B. R. M. S. Viner,
Church-warden, 528.
p. 7.
Archdeacon cannot refuse a church warden elected by the parish.
Church-warden.
Lord or steward of a leet may refuse a constable upon good cause.
Archdeacon a ministerial officer.

A *Mandamus* was directed to the archdeacon of St. *Asaph* to swear and admit *J. S.* being duly elected by the parish according to the custom, to be church-warden. To which it was returned, that *J. S.* was *minus habilis*, being a poor dairy-man, &c. And the question was, whether the archdeacon can refuse the church-warden, elected by the parish by the custom, for any cause whatsoever? And Mr. *Northey*, that he could, argued that the church-warden is *quasi* a spiritual officer, because he has the care of the church and all things belonging to it; and the archdeacon is more than a minister, for the party is examined before him in the spiritual court. And he likened it to the cases, where it has been ruled, that the lord or steward of a leet might refuse a constable for good cause, and the justices of peace have done the same. But it was resolved, that the archdeacon has no power in such case, to refuse to swear and admit the church-warden. For the church-warden is an officer of the parish, and his misbehaviour will prejudice them and not the archdeacon; for he has not only the custody, but also the property, of the goods belonging to the church, and may maintain actions for them; and for that reason it is an office merely temporal, and the archdeacon is only a ministerial officer. And therefore a peremptory *mandamus* was granted. And *per Holt* chief justice, in *London* both the church-wardens are appointed by the parish; but in other places the parson chuses one of them and the parish another; but this is rather by custom than by the common law.

Rex *vers.* Keite.

S. C. Comyns 13.
S. C. Skin. 666.
5 Mod. 287.
Salk. 47.

THE defendant *Keite* was indicted upon two several indictments, the one for the murder of *Wells* one of his servants, and the other indictment was found upon the statute of stabbing, upon which two special verdicts were found, viz. that *Keite* such

a day retained *Wells* to be his gardener, and that after some time ^{Gib. Hist. C. B. 139. 140. Mod. 49.} he sent *B.* another of his servants to *Wells*, to demand of him the key of the garden, having a design to discharge *Wells* from his service; that *Wells* refused to send the key; upon which *Keite* went to seek his sword, and having found it brought it with him to the kitchen, and there expostulated with *Wells*, who answered, that he might take the key if he would; and then *Keite* drew his sword, and struck *Wells* with it upon the head; and *Wells* taking the handle of a scythe attempted to strike *Keite*, but he was hindered by a rack; but he punched *Keite* with it several times; and *Keite* retired toward the door, and gave a wound to *Wells* with his sword in the ^{of which wound Wells such a day} died, &c. And it was argued by Mr. *Cowper* King's counsel, Mich. term last, and by serjeant *Wright* King's serjeant this term; that this fact is within the statute of stabbing, for the words of the act [unless first stricken by the person killed] must be intended of the first stroke of all; for otherwise the word *first* would be surplusage; for then it would be no more than to say, [unless the person killed has then a weapon drawn, or has stricken, &c.] which was not the intent of the act, but that the act intends the first stroke of all. And in this manner it is adjudged by eleven judges against one, Sir *W. Jones* Rep. 340. And the word [first] was cautiously inserted, for this statute was enacted in the time of King *James* the First, when many animosities arose between the *English* and the *Scotch*, who using daggers were accustomed to stab many of the *English* *ex improviso*, which could not have been done by a flat sword the usual weapon of the *English*; therefore this statute was designed to secure defenseless people from surprise, supposing that whosoever struck first, would be prepared. And if the word *first* shall not be expounded in this manner, the statute will be easily eluded; for if *A.* being armed comes to *B.* who has no arms, and gives him a blow, *B.* naturally gives another to *A.* and then *A.* stabs *B.* by this construction of the statute *A.* will be out of danger of the act, because *B.* had given him a blow. But certainly it was never the intent of the act, that a case so mischievous should be without remedy and punishment. Besides that, this present case is stronger than that of *Jones* 340. for there the party that was killed, struck him who killed him, before he had a mortal weapon, so that when he that was killed struck, he could not be said to have been in danger of his life, and to have struck in defense of his life. But in this case the party killed was struck first with a weapon drawn, and which threatened death; and then in such a case it is natural, that a man should struggle in defense of his life, which he then might well imagine to be in danger.

2. The words of the statute are [not having then a weapon drawn] now in this case *Wells* had no weapon drawn, for he had nothing but

See Mr. J. Foster's discourse the 2d chap. 6. of the stat. of stabbing, per tot. fo. 297.

but the handle of a scythe, which belonged to his business as a gardner, and it is no weapon. It hath been held, that a candlestick, bottle, &c. are weapons drawn within the act; but these resolutions seem to be without foundation. For one may as well say, that if *A.* comes to *B.* in his study with his sword drawn, and *B.* takes his book in his hand, that this book shall be a weapon drawn, which is absurd. But the statute intended a weapon defensible against a weapon used to kill. And though these resolutions aforesaid may be said to be *in favorem vitae*, yet it is but *misericordia puniens*. And for these reasons they prayed judgment for the King upon the indictment upon the statute of stabbing.

Against this it was argued for the prisoner by Sir *Bartolomew Shower* and serjeant *Levinz*, that this statute, taking away the benefit of clergy, ought to be taken strictly. The words are [not having then a weapon drawn] which [then] must refer only to that which was mentioned before; and no affray, quarrel, &c. being mentioned before, but only stabbing or thrusting, it must relate to them; and consequently having a weapon drawn at the time of the stab or thrust is sufficient. The intent of the act was to prevent murder by surprise, which cannot be where there is a struggle, quarrel, or blows interchanged. And this is proved by the form of the indictments upon this occasion, which are never that *A.* assaulted *B.* *qui adtunc non prius percussit*, and then *A.* stabbed *B.* but they are always that *A.* stabbed *B.* *qui adtunc non prius percussit*. Then the word [first] immediately following the word [then] and being coupled to it, must refer to it. For the words are [not having then a weapon drawn or then first struck] then the words being disjunctive by the word [or] the one or the other, *viz.* whether the person killed had a weapon drawn, or had struck the other, before he was stabbed, prevents the penalty of the act. Now in this case both these things happened. For 1. *Wells* had then a weapon drawn, *viz.* the snead of the scythe, which being pointed with iron is more offensive than a candlestick, bottle, cudgel, &c. which have been adjudged to be weapons drawn. *Stile* 467. *Godb.* 154. *pl.* 204. And it is not like a book in a study, which is not so offensive. 2. *Wells* had struck the prisoner, before he was stabbed; for he punched him with the handle or sneath of the scythe. But admit that the word [first] in the act ought to have such construction as the King's council would have it, yet in this case *non constat*, but *Wells* gave the first stroke of all, for it is found here, that *Keite* struck *Wells*, and that *Wells* punched him; but it is not said in the verdict, *super quo*, or *postea*, *Wells* punched him; so that it may be, that *Wells* struck him first of all, for the placing of these words before those is no argument, that the act which these

To what the word [then] in the act relates.

The intent of the act.

The form of indictments upon this act.

To what the word [first] relates.

What shall be said a weapon drawn.

The uncertainty of the verdict.

How words shall be expounded with respect to their position.

these import, was done before the act which those import; for the words could not be uttered altogether. The anabaptists may as well argue, that because the words of the scripture are, Go, teach, and baptize all nations, that the word teach being before baptize, people ought to be instructed in the gospel before they be baptized; but this kind of argument will certainly be exploded.

To this objection the King's counsel answered, that when no time is expressed, and it is impossible that all should be done at one time; the facts shall be construed to be done in time, as the words are placed, especially when the nature of the thing tends to such construction. As here it is found, that after that *Wells* said to *Keite*, that he might have the key, the prisoner then drew his sword; which must be intended immediately. And as to the passage out of the scripture, it would be a very good argument for the anabaptists, if there were not other passages there expressly contrary; and then the construction of the doubtful sentences must always be directed by those which are express.

Sir *Bartholomew Shower* and serjeant *Levinz* proceeded in their argument for the prisoner, that this act must be taken strictly, as appears by *Stile* 467. *Allen* 43. For if two men draw their swords upon one man unarmed, and the one only gives the stroke, the other is out of the act, though the indictment may recite, that either of them made the stroke. And if it cannot appear which of them made the stroke, then both of them are out of the statute. Now the intent of the act was to prevent murder by surprise; but in this case there was no surprise, for there was at the beginning an expostulation, and afterwards in the affray *Keite* retired; and then, it being in a large kitchen, *Wells* might have escaped, and could not be said to be stabbed suddenly, and so this case out of the intent of the act. Besides that the act provides, that it shall not extend to killing in any other manner than is there mentioned; and there is a special proviso, that it shall not extend to any person, who in chastising his servant, contrary to his intent, shall commit manslaughter. And in this case without doubt the first blow was designed to correct the saucy refusal of the key, &c. And the mortal blow was not with an intent to kill, for it was not in the body, but was designed as a correction, as well for the preceding faults, as for the many punchings of the prisoner; for which they concluded, that this was out of the act.

The act shall be taken strictly.

The intent of the act.

Holt chief justice, If the verdict is imperfect, no judgment can be given, but a *venire de novo* ought to issue. For though it is a special verdict, yet it cannot be amended by the notes in felony, as it might in civil causes. And though the jury have found a killing

Special verdict in criminal cases not amendable.

O o

(which

Special ver-
dict, how im-
perfect.

(which the counsel objected was the substance of the charge, and so too perfect to be quashed) that is not enough; for the injury is charged with murder, and then if they find a killing so uncertain, as that it cannot be known whether it be murder or not, it is an imperfection in substance, and the jury could not discharge themselves. But here the verdict is certain enough; for it is found, that *Wells* said to *Keite*, that he might take the key if he would, and then the prisoner drew his sword, which is immediately after. And to this opinion *Turton* justice agreed, for the facts must be supposed to be done, in the order that they are put and found by the verdict. But *Eyre* and *Rokeby* justices held the verdict uncertain, and therefore (by them) a *venire facias de novo* ought to issue.

Curia.

But as to the matter in law *Holt* chief justice seemed to be strongly of opinion, that the statute intends, by the first stroke, any stroke before the mortal wound is given. This point came in question at the beginning of the last reign, but was not determined. And therefore (by him) if *A.* stabs *B.* who before had given him a blow, or had assaulted him; *A.* is out of the penalty of this act. But the other justices gave no opinion to this, but were silent.

As to the special verdict upon the indictment for murder, Mr. *Cowper* and serjeant *Wright* argued,

Malice.

Foster. Dif-
course the 2d
on homicide.

1. That there was here a malice in *Keite*; for the sending for the key, with intent to discharge *Wells*, shews that *Keite* had displeasure; and though there was new provocation, that does not hinder the former disgust from continuing. Besides that, the manner of behaviour implies malice, for he went away to fetch his sword, and brought it with him, which shews that he had an ill design; and then he expostulated with *Wells*, which shews deliberation.

Sufficient pro-
vocation.

2. Admit that *Keite* had no malice, yet to kill a man without provocation, or provocation sufficient to make it manslaughter, will be murder. Then here the denial of the key was not sufficient provocation, nor a saucy answer of a stranger, much less of a servant who is under the care and protection of his master, and consequently he ought to be more industrious for his safety. If *A.* kills *B.* for distorting his mouth and mocking him, it is murder. *Hale P. C.* 45. And though *Wells* before the mortal wound given struck *Keite*, that is nothing, for it is but natural in defense of his life, since he was attacked with a naked sword.

But

But against this it was argued by Sir *Bartolomew Shower* and *Murder, what*
serjeant Levinz for the prisoner, that murder heretofore was very
 uncertain. Sometimes a killing *se defendendo*, and death *per infor-* *Foster 307.*
tunium, were esteemed murder. By the canon law the punishment *ecc.*
 was only a fine. In *Stanford* 16. it is called *occulta occisio*. So
Bracton and *Fleta*. 2 *Inst.* 240. 21 *Edw.* 3. 17. says, that it
 must be *felleo animo*. 3 *Inst.* 55. *ex malitia praecogitata*. *Co.*
Li. 287. adds, with a man's will. And in murder it is not ma- *Sufficient pro-*
 terial, who struck the first stroke, unless all the subsequent acts and *vocation.*
 strokes are *se defendendo*. But in this case *Wells* compelled *Keite* to
 retire, by which it appears, that his blows were offensive, and not
 defensive, which were sufficient provocation, without making men-
 tion of the refusal of the key and unmannerly answer. If two
 fight immediately upon a challenge, and the one is killed, it is but
 manslaughter; and yet a challenge is but a small provocation, be-
 ing only an intercourse of words. 3 *Bulstr.* 17. In *Mich.*
 13 *Jac.* 1. in a case between the *King* and *Newbury*. *A.* said to *Rex v. New-*
B. give me your bowl, *B.* answered, I will not be gulled; and af- *bury.*
 ter some dispute *B.* killed *A.* with the bowl; and yet it was ad-
 judged but manslaughter. In the case of *Mr. Reneer*, *Cimbal* gave *Reneer's case.*
 no stroke but in struggling, and yet it was adjudged but man-
 slaughter in *Reneer*. *Turner's case* was still stronger; for there *Turner's case.*
Turner's footman not having cleaned his mistress's clogs, *Turner*
 struck him with the clog, of which stroke he died, and adjudged
 manslaughter. In *April* 1666 the case of *Hopping* and *Hungate* *Hopping and*
 was thus; *A.* pressed *B.* who was a stranger to *Hungate*, *Hungate* *Hungate's*
 followed the press-master, and demanded a sight of his warrant, and *case.*
 after seeing it said, that it was no warrant; and after some words
 exchanged *Hungate* drew his sword first, and killed the press-master;
 and it was adjudged that this was but manslaughter. *Hob.* 134.
 says, if two masters be playing their prizes, the one kills the other,
 it is not felony; and yet the first act there is not lawful. So *A.* *Where the il-*
 turns *B.* out of his house, *B.* comes to burn the house, *A.* shoots *legality of the*
B. but manslaughter, and yet the first act was unlawful. *A.* *act will make*
 knowing that many people are coming in the street from sermon, *subsequent*
 casts a stone over the wall, intending only to frighten them, &c. *death murder.*
 3 *Inst.* 57. says, that this is murder; but that is not law, for to
 make murder there must be an intent to kill. *Hale P. C.* 44.
 (Note, *Holt* chief justice agreed with this, and said that the opi-
 nion of *Coke*, 3 *Inst.* 57. was too general, and ought to be quali-
 fied with the distinction that my lord *Hale* makes, *H. P. C.* 44.
 where the act is done with a design to do mischief to any, and where
 not.) But in this case the first blow was a lawful correction.
 Passion is a natural infirmity, and what proceeds from that, can-
 not be called murder; for passion is a sudden motion, and mur-
 der

der is *ex malitia praeconitata*, which implies consideration. And Murder, what the rule is, that when there is a deliberate act, tending immediately to death, or by necessary consequence, it is murder. But in this case there was no deliberation, for the prisoner's passion might well be said to continue, from the refusal of the key until the mortal blow given. Wherefore they concluded, that this was but manslaughter, and prayed judgment for the prisoner.

Provocation. *Holt* chief justice, The refusing to deliver a key by a servant to his master, who had a design to discharge him; is no provocation; and if a master gives correction to his servant, it ought to be with a proper instrument, as a cudgel, &c. and then if by accident a blow gives death, this would be but manslaughter. The same law of a school-master. But a sword is not a proper instrument for correction, and the cruelty of the cut will make a malice implied. And therefore in this case, if *Wells* had not been killed, *Keite* could not have justified this fact in an action of trespass; for it was immoderate correction, and therefore *Wells* well might return the blows; so that the blows of *Wells* could not be called a provocation, nor the first act of *Keite* lawful. Then the words could not amount to a provocation, for bare words cannot make a provocation to kill or maim. Therefore in 1663 *Grey* commanded his servant *B.* to do something; and afterwards *Grey* and *B.* doing their work at the anvil, *Grey* asked *B.* if he had done the thing, *B.* answered yes; *Grey* told him, that if he did not take more care of his affairs hereafter he should go to *Bridwell*; *B.* answered, that he should like better to work there, than to serve *Grey*; upon which *Grey* killed *B.* with a blow of his hammer upon his head, and it was adjudged murder. In the case of *Hopping* and *Hungate* it was held manslaughter by all the justices of the Common Pleas and barons of the Exchequer; because though *Hungate* was a stranger to the person pressed, yet this being done under pretext of authority, it concerned every subject; but all the judges of the King's Bench held it murder. And all the judges agreed, that if this was no provocation, the exchange of blows afterwards would not make it manslaughter. For if *A.* of malice prepense assaults *B.* *B.* draws his sword, *A.* flies to a wall and there kills *B.* yet it is murder. In *Reneer's case.* *Reneer's case* *Cimbal* struck first. In *Turner's case* the event was extraordinary, for he could not intend to kill the boy with the clog. But if *A.* kills *B.* with an instrument of iron, &c. which might kill in probability, without any provocation, this will be murder. But the other justices did not give their opinion. And this case being argued now the last day of the term, the court did not give their opinions to the matter in law. But *Holt* chief justice took exceptions to the indictment upon the statute of stabbing, that it was only said [not having first struck] but it is not said [not having

having a weapon drawn] for if the prisoner had killed *Wells*, after that he had a weapon drawn, he would be out of the intent of the statute; and therefore all the court held this a fatal exception. Then to the indictment for murder *Holt* chief justice took several exceptions. 1. Because it is said, *praedictus J. Keite* the prisoner *Exceptions to the indictment of murder.* in ipsum *Jacobum Wells* insultum, &c. fecit, ipsum *Jacobum Wells* cum quodam gladio, &c. quem in manu dextra, &c. ipsum *Jacobum Wells* in et super, &c. pupugit, &c. and so there is one *Jacobum Wells* more than there ought to be. *Abundance.* 2. It is said that *Keite* gave to *Wells* a wound of the breadth of one inch, et profunditatis totally through the body; which (by him) is uncertain. In 5 Co. *Uncertainty.* 120. *Long's* case, totaliter penetrans in et per corpus was held well enough; but there was no profunditatis mentioned, and there are no precedents which warrant this case; and he said, that he had caused several indictments at the *Old Baily* to be searched. 3. It is percussit et dedit, where it should have been percussit dans, for *Wilson v. Law.* the former is not so certain, because it might be by another stroke; but the precedents are both the one way and the other. He did not say absolutely, that these exceptions to the indictment of murder are fatal; but he said, that if the King's council did not insist to demand their judgment upon the verdict, he should make no scruple to quash it. And the King's council not opposing it, both the indictments were quashed. And *Holt* chief justice gave order to the clerk to make an entry, that quia indictment minus sufficiens &c. ideo, &c. And Mr. *Keite* was bailed, to be tried at the next assizes, where he was found guilty of manslaughter, and had his clergy, &c. and died of the small pox 1697 in *Wiltshire*, his own country.

Roe vers. Gatehouse.

Assumpsit, in which the plaintiff declares, that inasmuch as the defendant being indebted to the plaintiff in for goods S. C. 2 Salk. 663. sold, such a day super se assumpsit to pay the plaintiff the said sum; Carth. 379. 5 Mod. 305. cumque etiam the plaintiff had found meat, &c. for J. S. at the Lutw. 233. special request of the defendant, which amounted to so much, super se assumpsit to pay the plaintiff, &c. Verdict for the plaintiff, and intire damages were given. And it was moved in arrest of judgment, that every promise is a distinct declaration, and that in the second promise (which for greater reason might be esteemed a new count, by virtue of the words cumque etiam) non constat who made the promise, J. S. or the defendant. Perhaps it was J. S. and then it will not bind the defendant. Then damages being given ratione praemissorum vitiates the whole, for the word praemissorum extends to both the breaches assigned. And this uncertainty

London v. Hart. tainty is not aided by the verdict, and it cannot be made good by intendment; for the promise is the *git* of the action; and the *git* of an action, though after verdict, cannot be taken by intendment. *Noy* 50. 3 *Cro.* 913. *Trin.* 4 *Jac.* 2. *B. R.* rot. 993. *London v. Hart.*

But *e contra* it was argued for the plaintiff, that it shall be intended, that the defendant assumed; for the money paid was to his use, and at his request. Besides that, if the defendant shall not be the nominative case to *assumpsit*, then there is no promise; for it has no nominative case, and so no damages were given for it, but for the breach of the other promise, and to it *praemissorum* must relate. But it would have been otherwise if there had been a promise, but not a binding one in law for some collateral account; because the jury not knowing the law, might be supposed to consider it as a promise, and so give damages for it. But here there is no promise, and therefore no damages given for it. But judgment was given for the plaintiff, because the *cumque etiam* in effect is all one with *ac etiam*, and so couples both the sentences together, and makes the defendant the nominative case to govern the second *assumpsit* as well as the first. For the plaintiff's cause of action arises from both the promises; and it cannot be supposed, that the plaintiff would bring an *assumpsit* against the defendant, because J. & made the promise. See 1 *Sid.* 292. *Latch.* 125. 3 *Cro.* 847, & 703. *Per Holt* chief justice, if divers considerations are mentioned in one *assumpsit*, and one of them is void and the others good, and damages are given *ratione praemissorum*, this will not arrest the judgment, because the damages shall be intended to be given only for those that are good.

Chamberlain *vers.* Harvey.

S. C. Carth. 396. 5 *Mod.* 186. *Trespas* for a Negro does not lie. 2 *Lev.* 201. **T**respas for taking of a *Negro pretii* 100 l. The jury find a special verdict; that the father of the plaintiff was possessed of this *Negro*, and of such a manor in *Barbadoes*, and that there is a law in that country, which makes the *Negro* part of the real estate: that the father died seised, whereby the manor descended to the plaintiff as son and heir, and that he endowed his mother of this *Negro* and of a third part of the manor; that the mother married *Watkins*, who brought the *Negro* into *England*, where he was baptized without the knowledge of the mother; that *Watkins* and his wife are dead, and that the *Negro* continued several years in *England*; that the defendant seised him, &c. And after argument at the bar several times by Sir *Bartholomew Shower* of the one side, and Mr. *Dee* of the other, this term it was adjudged, that this action will not lie. *Trespas* will lie for taking of an apprentice,

tice, or *hæreditas apparentem*. An abbot might maintain trespass for his monk; and any man may maintain trespass for another, if he declares with a *per quod servitium amisit*; but it will not lie in this case. And *per Holt* chief justice, *trover* will not lie for a *Negro*, *contra* to 3 *Keb.* 685. *Butts v. Penny*. Trespass, where it lies?

Hill. 5 *Will.* & *Mar.* C. B. between *Gelly* and *Clove*, adjudged that *trover* will lie for a *Negro* boy; for they are heathens, and therefore a man may have property in them, and that the court without averment made will take notice that they are heathens. *Ex relatione m^{rs} Place*.

Pasch. 5 *Ann.* B. R. *Smith v. Gould*, adjudged that it lies not. See 2 *Salk.* 666.

Derry vers. ducissam Mazarine.

Derry brought an action against the duchess for wages, and money lent; the defendant pleaded coverture, and issue thereupon. And notwithstanding that there was very strong evidence at the trial, that the duke of *Mazarine* the defendant's husband was alive in France, the jury find for the plaintiff; because the duchess had lived here in England for twenty years as a *feme sole*, and had contracted continually as such; and he who was her husband, is an alien enemy. And it was moved on behalf of the duchess, that this verdict was against evidence and law, for a *feme covert* cannot be sole charged for debts and contracts, without divorce and alimony, although the husband be a foreigner. But *Holt* chief justice, when the husband is an alien enemy, and under an absolute disability to come and live here, the law perhaps will make the wife of such a husband chargeable as a *feme sole* for her debts and contracts. For this case does not differ from the case of my lady *Belknap* and my lady *Weyland*, who were allowed able to sue and to be sued upon the abjuration or banishment of their husbands, as if they had been sole. And afterwards the plaintiff had his judgment, as Mr. *Colman* told me.

S. C. 1 *Salk.* 116.
2 *Salk.* 646.
Feme coverte of an alien enemy suable,
In delivering the opinion of the court, *Hil.* 12 *Geo.* 2. in the case of *Smith and Dormer v. Parkhurst*, it was said that the honesty and equity of the case had been a reason for refusing a new trial, and cited this case of *Derry v. duchess of Mazarine*.

Redwood vers. Coward.

Intr. Trin. 8 *Will.* 3. *Rot.* 645.

Error of a judgment of the palace court in *assumpsit* after verdict; and the error assigned was, that in the verdict the record is, that the jury *assident damna*, where it ought to be *assidunt*; as if judgment is entred with *concessum* instead of *consideratum*, it is error, and *Affidunt*.

S. C. 1 *Salk.* 328.
5 *Mod.* 323.
2 *Saund.* 97.
1 *Mod.* 292.

and for this the judgment shall be reversed. But against this *Ward* argued, that *affidens* is more elegant *Latin*, for the simple verb is of the second conjugation, and therefore the compound ought to be of that also. And for authorities there is *Plowd.* 348. 4 Co. 7. b. in point. But *per Holt* chief justice, the elegancy of the *Latin* is not considerable, for the law prescribes for odd words; but there is a difference between a verdict found by lay people, and a judgment given by a court. Therefore in the former case if the words are of the same import that the jury intends, all is well; but in the other the terms of art must be used. *Concessum* in a judgment is ill, because the judgment does not appear to be given upon mature deliberation, as all judicial acts ought to be. Judgment was affirmed.

Rex *vers.* Burdett.

12 Mod. 111.
S. C.
2 Salk. 645.
S. C.

Causes to set
aside a verdict.

What is extor-
tion? see 10
Rep. 102. a.

Keb. 824.
2 Ro. Rep.
261.

Sid. 235.
Palm. 325.
2 H. Hist.
P. C. 308.

Lady Joy's
case.

Papers disper-
sed.

What wri-
tings the jury
may take
with them.

Bro. Verd.
pl. 19.

Information was brought against *Burdett*, farmer of *Newgate* market, for extortion; and the extortion was assigned, for that he had taken divers sums of money of the market people for rent for the use of the little stalls in the market, and divers great sums for fines. And at *nisi prius* in *London*, upon the general issue pleaded, the defendant was found guilty. And now it was moved by Sir *Bartholomew Shower*, Mr. *Northey*, &c. to set aside the verdict. And two irregularities were assigned. 1. That a certain printed paper, representing the pretended ill practices and the pernicious consequences of them, was sent to all persons, who probably would be of the jury, to induce them to find the defendant guilty. 2. That the jury took with them out of court an order of the common council, without the leave of the court or consent of the parties. And they cited the case of my lady *Joy*, where a verdict was set aside, because the jury took with them a map of the premises out of court. But as to the first, *Holt* chief justice said, that it was a great crime in those who had done it; and he said, they sent him one of them by the penny-post, but casting his eyes upon the title, he saw what it was, and did not read it; but that was not fixed upon the informers, and if the delivery of papers by a stranger were sufficient to avoid a verdict, the case would never be decided. As to the second point, he said, that it was irregular to take the act of common council; but the matter of the act being evidence on both sides, it would not set aside the verdict. The same law if the jury eat at their own costs, this will not set aside the verdict, but it is fineable. In my lady *Joy*'s case, the map which the jury took with them, was evidence only on one side, and therefore, finding a verdict accordingly, it was set aside. And as to the fact which was the ground of this information, it was urged now in *B. R.* and also at *Guildhall*, by serjeant *Wright* at the

the trial of another information for the like fact (for there were several preferred against the defendant) that this was extortion, ^{Extortion, what.} because the people had not free liberty to sell their wares in the market according to law. And he compared it to the case of a miller, who, if he takes more for toll than is due by the custom is punishable in every leet. But it was held by the court of B. R. and by *Holt* chief justice at *Guildhall*, that if the defendant erects several stalls, and does not leave sufficient room for the market people to stand and sell their wares, so that for want of room they are forced to hire the stalls of the defendant, the taking of money for the use of the stalls in such cases is extortion. But if the people have room enough clear to themselves, to come and sell their wares, but for their farther conveniency they voluntarily hire these stalls of the defendant, without any necessity compelling them; there it is no extortion, though the defendant takes a fine and rent for the use of them. And the case of the miller is not parallel to this case, for there when the custom has ascertained the toll, if the miller takes more than the custom warrants, this is perfect extortion: but in this case the law has not appointed any stalls for the market people, but only that they shall have the liberty of the market, which the defendant does not abridge, having left them room enough beside the place where the stalls are set; and then if they will enjoy the convenience of the stalls, they must comply with the defendant's terms. Therefore this case rather resembles the case of new mills, where the miller is not restrained to any certain toll; but the persons who will have their corn ground there, must comply with the miller's demands; and whatsoever he takes, it is not extortion, because it is the voluntary agreement of the parties. And afterwards these disputes were submitted to the arbitration of Sir *Bartholomew Shower* and serjeant *Wright*, and so the informations were discontinued.

Difference between customary mills, and new mills.

It was said by *Holt* chief justice, at the trial at *Guildhall*, that if a man be indicted for taking extorsively twenty shillings, and there is but proof of one shilling, yet the defendant is guilty. And (by him) the extorsive agreement, or usurious agreement, is not the offense, but the taking; for a pardon after the agreement, and before the taking, does not pardon the extortion or usury.

Bennett *vers.* Talbois.

TRESPASS *quare clausum fregit et herbam cum duabus vaccis conculcavit et consumpsit et in clauso venatus fuit, &c. exi- stente inferiori artifice, viz. pannario, et alia enormia, &c.* and concludes, *contra formam statuti*. Upon not guilty pleaded, verdict ^{S. C. 1 Salk. 212. 5 Mod. 307. Carth. 382. Statute of hunting. Post. 1164.}

S. C. Comb. 420. 12 Mod. 122. Holt's Rep. 634. Comyns 26. S. C.

Q q

for

Hunting in
alieno solo is
trespass at
common law.

Contra for-
mam statuti.

See 2 Sid. 52.
2 Inst. 200.
1 Cro. 233.
1 Vent. 103, 4.
2 Cro. 183.
4 Leon. 49.
3 Cro. 330.

for the plaintiff. And Mr. Webb moved in arrest of judgment,
1. That it is not said, that the defendant is not qualified by estate
to hunt, without incurring the penalty of the act; for if he be,
he might hunt by law. But to this it was resolved by the court,
that hunting is a trespass *in alieno solo* at common law, and
actionable. Then the new statute 4 & 5 Will. & Mar. cap. 23.
only, as to this point of inferior tradesmen, repeals the statute of
22 & 23 Car. 2. cap. 9. which enacts, that the party shall re-
cover no more costs than damages, when the jury give damages
under forty shillings. But no act enables the party to hunt in an-
other's ground; and therefore it is not material, how the person is
qualified, in the case of an inferior tradesman, as to his estate.
Then it was moved, that the plaintiff having concluded, *contra*
formam statuti, this goes to the whole, and therefore it is ill; for
the trespass is an offense at common law, and not against any
statute. But to this Holt chief justice answered, that if an act
of parliament increases the penalty, or deprives the party of the
benefit of the common law, there he ought to conclude *contra for-*
mam statuti. But if a man brings an action for such an offense,
and for a thing that is an offense only at common law, and con-
cludes *contra formam statuti*; though in grammar this goes to the
whole, yet the court will refer it only to the offense that is prohi-
bited, &c. by the statute, and it shall be surplusage as to the of-
fense at common law. And he resembled it to the case of *Page*
and *Harwood*, *Allen* 43. So if a man brings an action for an
offense *contra formam statuti*, where there is no statute, there the
contra formam statuti, shall be surplusage. And he cited a case in
1 Vent. 103. where *A.* brought an action for withdrawing his wife
contra formam statuti, and because there was no statute, this was
adjudged surplusage. But in this case the act of Will. & Mar. does
not create a new penalty, but is a restitution of the common law;
and therefore the party has no need to declare with *contra formam*
statuti; and therefore it will be the better way hereafter to omit
the *contra formam statuti* in such cases. And if the plaintiff de-
clares that the defendant was an inferior tradesman, he shall have
full costs. Then here, since he has declared with a *contra formam*
statuti, where there was no need of it, without doubt it shall be
surplusage. And therefore judgment was given for the plaintiff,
nisi, &c. And in *Easter* term it was absolutely given for the
plaintiff.

Rex *vers.* Yaites:

Yaites was convict of killing rabbits in a private warren, by in- Game.
 quisation taken before a justice of peace, and was fined 20 s. a 5 Rep. 104.
 rabbit. And Mr. Northey moved to quash the inquisition, because 1 Cro. 548.
 the justices of peace have no authority to set a fine upon a man for Justices of
 such offense. For the statute 22 & 23 Car. 2. cap. 25. gives treble peace cannot
 costs and damages, but no fine. And the statute 4 & 5 Will. & assess a fine
 Mar. cap. 23. extends only to game, which cannot be extended to certain for
 rabbits kept in a private warren. And of this opinion was the whole killing of rab-
 court, and therefore the inquisition was quashed. bits in a pri-
 vate warren.

Walker *vers.* Stokoe:

Walker brought a writ of error, which was quashed; and now S. C. Carth.
 he brought error *coram vobis residet*, reciting *quod venire fe-* 367.
cimus the record by a former writ returnable *in curia nostra coram* 5 Mod. 16,
nobis. And Mr. Northey moved last Michaelmas term, that the 69.
 writ of error *coram vobis*, &c. being entred upon the same roll S. C. Comb.
 with the former writ of error (as it should be, otherwise the whole 354.
 would be, though after verdict, 3 Cro. 106. discontinued) and it Variance be-
 is apparent upon the former writ of error, that it was returnable tween writs of
 before the King and Queen; then since this writ recites, that the error.
 former writ was returnable before the King only in his court, it Discontinu-
 ought to be quashed. But against this Mr. Carthew argued, that the ance.
 the *coram nobis residet* recites, that in a record concerning such a
 matter between *A.* and *B.* *coram nobis jam residente*, &c. there is
 error; this is sufficient, and the rest is but surplusage, that will
 not abate a writ of error, which is but a commission to examine
 errors, and has no need to be so precise as an original writ. Be-
 sides that, the *coram vobis residet* mentions, that the record was
 removed before the King and Queen by a former writ of error re-
 turnable *coram nobis in curia nostra*, which may be true and good
Latin, though it relates to King and Queen. *Sed non allocatur*.
 For, *per curiam*, the authority of the court is given to them by
 the *coram vobis residet*, which is to examine errors in a record re-
 moved by writ of error *coram nobis in curia nostra*, and there is no
 such writ, or perhaps there was subh a one, and also another re-
 cord between the same parties removed by writ of error returnable
 before the King and Queen. Then here the *coram nobis* is an-
 nexed to the return of the last, and therefore ill. For though the
 former writ of error was quashed, yet it is not as if it had never
 been, for it is there still, though it cannot be proceeded upon, and
 the

the King's Bench ought to take notice of its being quashed by them, and so ought the plaintiff also, the *coram nobis residet* being grounded upon it. And *Holt* chief justice said, that if the writ of error had been granted in the time of the King and Queen, and then the Queen had died, and then the record had been brought into the King's Bench, this had been such a record as the *coram nobis residet* describes. And he took the distinction, *Yelv.* 211. (a) And therefore *Holt* chief justice said, that he did not approve the resolution of *Saund.* 291. *Gay v. Adams.* Where the suit is to defeat a record, then the variance is fatal; but where the suit goes to another collateral matter, and not to defeat the record, there it is otherwise. And upon this distinction the case in 31 *Affis. pl.* 1. is held to be good law, because the discharge of the *aide prier* is but collateral to the demand in the assise. And for these reasons the writ of error *coram vobis* was quashed, *nisi, &c.*

Benzen *vers.* Jeffries.

Hypothecation.

Costard v. Lewstie.
12 Mod. 406.
Post. 805,
806, 983.
6 Mod. 79.
Comb. 135.
2 Hen. 4.
c. 11.

MOtion was made for a prohibition to the court of admiralty, where a suit was prosecuted against a ship, which the master had hypothecated for necessities, being upon the sea in stress of weather. And the suggestion was, that the agreement was made, and the money lent, upon the land, *viz.* in the port of London, it being a *Venetian* vessel, which came here by way of trade, and not stress of weather. But *per Holt* chief justice the master of the ship has power to hypothecate it, but he cannot sell it; and by the pawning, the ship becomes liable to condemnation. This was resolved in solemn debate in the case of *Costard v. Lewstie*, 2 Will. & Mar. B. R. Then there is no remedy here for the hypothecation, but by way of contract. Therefore since the King's Bench cannot do right to the parties, it will not hinder the admiralty from doing them right. For if the King's Bench allows the hypothecation, and yet denies the remedy, it will be a manifest contradiction. An action was brought upon the statute 2 Hen. 4. cap. 11. for suing in the admiralty upon a hypothecation, and it was held to be out of the statute, in the time of my lord *Hale*. And as to the objection, that the contract was made upon the land, and the money paid there; it must of necessity be so, for if a man be in distress upon the sea, and compelled to go into port, he must receive the money there, or not all. And if his ship be impaired by tempest, so that he is forced to borrow money to refit, otherwise she will be lost, and for security of this money he pledges his ship; since the cause of the pledging arises upon the sea, the suit may well be in the admiralty court. But because there was a precedent, where a prohibition in such case had been granted; the court granted the prohibition, and ordered the plaintiff

tiff to declare upon it, for the law seemed clear to them, as before is said.

Rex *vers.* Penny.

THE defendant was indicted, for having spoken these words s. c. Comb; of Mr. Martin a justice of peace: I did not care if all the 414. Martins had been hanged five years ago. And the justice is now turned out of the commission. And upon motion this indictment was quashed, for an indictment does not lie for these words, but for words. Mr. Martin should have recourse to his action.

Draper *vers.* Glassop.

PER Holt chief justice, if the defendant pleads *non assumpsit*, 1 Salk. 278; he cannot give in evidence the statute of limitations, because the *assumpsit* goes to the *praeter-tense*; but upon *nil debet* pleaded the statute is good evidence, because the issue is joined *per verba de praesenti*, and without doubt *nil debet* by virtue of the statute; and it is no debt at this time, though it was a debt. Statute of limitations in evidence upon what plea? Skin. 195, 241

The president and college of physicians *vers.* Talbois.

THE plaintiffs brought an action against the defendant *tam quam*, for practising without license, &c. And serjeant Darnall took exception, that the action was misconceived, for it should have been sued singly in the name of the president according to 2 Cro. 121, 159. 1 Cro. 256. But *per curiam*, the precedents have been the one way and the other; and this seems to be the better method, for being a corporation, it is natural for them to sue by their name of creation. Post. 472; 680. Action brought by the college of physicians.

Bracy's case.

BRacy was examined before commissioners of bankrupts, for having taken certain goods of A. who was a bankrupt, and Bracy made depositions. Afterwards the commissioners of bankrupts assigned these goods to the creditors of A. who brought an action against Bracy. And now Bracy moved in B. R. that he might have a copy of the depositions in order to defend himself, upon allegation that they were in nature of a publick memorial, and that by ignorance and surprise he had subscribed many things to his prejudice. Copy of depositions taken before commissioners of bankrupts denied. 2 Stra. 1005.

prejudice. But the motion was denied; for *per curiam* these depositions are not of a publick nature, but taken by the commissioners to defend themselves; and therefore they could not order a copy of them.

John Arthur's case.

S. C. 2 Salk. 495. **J**OHN Arthur was outlawed for burglary, and now he brought error to reverse it. But *per Holt* chief justice, he must sue a *scire facias* against all the lords mediate and immediate; or the more expeditious way is, that he may suggest upon the record, that he has no lands, and if the attorney general confesses this, he has no need to sue a *scire facias*.
 Outlawry reversed.
 Bro. *sci. fa.* pl. 194.
 12 Mod. 668.
 12 Mod. 545.

Hoe *vers.* Nathrop.

S. C. 3 Salk. 54. **R**ESOLVED *per curiam*, that the immediate copy of an original is good evidence where the original itself is evidence. Therefore the copy of a church register, the copies of town books, of proceedings in courts baron, of proceedings in the ecclesiastical and admiralty courts, and the copy of a probate of a will which concerns personal goods, is good evidence; but the copy of a probate of a testament, as to the real, is not evidence, because the probate itself is not evidence in such case.
 Copy where evidence?
 10 Rep. 92, 93.
 1 Stra. 446.
 1 Ro. Abr. 678.
 T. Raym. 405.

Tregany *vers.* Fletcher.

S. C. 2 Salk. 676. **E**RROR out of the great sessions in *Wales*. Replevin. The defendant makes confuance, that *A. B.* seised of *Blackacre*, &c. in fee, devised them to *C. D.* in tail, and *C. D.* suffered a common recovery, and made a subsequent deed, by which he agreed, that the recovery of *Blackacre inter alia* should be to the use of *J. G.* for a security of a rent-charge, and that it should be lawful to him to distrain for arrears of rent, and then he avers that the rent was arrear, and for the arrears he makes confuance as bailiff to *J. G.* The plaintiff demurs. And judgment was for the avowant. Upon which the plaintiff brought error. And *Northey* took exception, that in pleading the common recovery it is said, that the writ of entry in the *post* issued out of the Exchequer, and does not say, out of the court of Exchequer. *Sed non allocatur*. For *per Holt* chief justice, if there was no original, the recovery would be good until reversal; but farther the King's Bench will take notice, that the Exchequer in *Wales* is a court; and
 B. R. will take notice that the Exchequer in *Wales* is a court.

and therefore it is well enough. 2. Exc. That the defendant should not have pleaded the deed as a declaration of uses, but as 9 Co. 9. *Dowman's case*. And *per Holt* chief justice, if a precedent deed be made, whereby it is agreed, that the recovery, which is to be suffered, shall be to such and such uses, and a recovery is afterwards suffered accordingly; one cannot aver the recovery to be to other uses than those mentioned in the deed, without shewing a new agreement; but if the uses are declared by a subsequent deed, there they arise by the recovery, and there may be a parol averment, that the recovery was to other uses; but a subsequent deed is very strong evidence. In case of a precedent deed he must confess and avoid, but in case of a subsequent deed a man may traverse, the uses. And therefore here the defendant should have pleaded *quae quidem recuperatio habita fuit*, &c. to such and such uses. 2. The defendant pleads here a grant of a rent-charge out of the place where, &c. *inter alia*, whereas he should have shewn all the particular lands; for the plaintiff may come and reply, that you have purchased part, whereby the intire rent is extinct. This method of pleading is ill. *Adjournatur*.

Pleading of a grant of a rent charge out of B. *inter alia*, ill.

Hilary

Hilary Term

8 & 9 Will. 3. C. B. 1696.

Sir George Treby Chief Justice.
 Sir Edward Nevill } Justices.
 Sir John Powell }

Wilmore *vers.* Clerk and Howard.

Render of the
 principal, at
 what time
 pleadable by
 the bail?

THE plaintiff had obtained judgment in an action against J. S. in which the defendants were bail, and after *non est inventus* returned upon a *capias ad satisfaciendum* against J. S. the plaintiff Wilmore sued a *scire facias* against the defendants as bail, but before the return of the writ J. S. surrendered himself in discharge of his bail. Upon which it was moved by serjeant Bonithon on behalf of the defendants, that all proceedings upon the *scire facias* might be staid. To which it was objected, that this matter ought to be pleaded, and was not proper for a motion, especially since the defendants had accepted of the plaintiffs declaration, as in this case they had done. *Sed non allocatur.* For *per curiam*, the condition of the recognisance is, that if the defendant be condemned in the action, he shall pay the condemnation, or render his body to prison. The question then will be, at what time this render ought to be. And the law says, it ought to be, when the plaintiff in the original action has signified, that he will sue execution against the body (for he may sue execution against the goods and lands by *elegit* or *fieri facias* if he pleases) which he does by suing of the *capias ad satisfaciendum*. So that if a render be made upon the return of the *capias ad satisfaciendum*, *cepi corpus*, the bail may plead this in a *scire facias* upon the recognisance, or in debt upon the recognisance; for the bail may plead all the same pleas in debt upon the recognisance, that they may plead in *scire facias* upon the recognisance. But if *non est inventus* be returned upon the *capias ad satisfaciendum*,

Lit. Rep. 194.
 3 Cro. 738,
 618.
 3 Bulf. 182.
 Mo. 850.
 Sty. 425.
 3 Salk. 56.
 Rep. of Prac.
 in C. B. 23,
 53, 58.
 Trin. 2 & 3
 Geo. 2.
 Carth. 515.
 Post. 721.
 6 Mod. 231.
 1 Barnes 82,
 83.
 8 Mod. 340,
 131.

satisfaciendum, the condition of the recognizance is broken, and a render can never after be pleaded. Nor would the court heretofore accept such a render. 3 Cro. 738. *Alyson v. Byston*. But a great mischief accrued from this practice; for then they sued a *capias ad satisfaciendum* returnable the next day, so that the bail had no time to bring in the body. To prevent which mischief the judges indulged the bail so far as to permit them to render the body upon the return of the first *scire facias*, if the *capias ad satisfaciendum* was returnable *de die in diem*. 3 Cro. 618. But if the *capias ad satisfaciendum* was returnable at the next summons, then the bail was held strictly to render the principal upon the return of the *capias ad satisfaciendum*, and not after. 3 Cro. 738. But when *Popham* was made chief justice, he extended this favour so far, as to admit a render any time before the return of the second *scire facias*, or upon the return *sedente curia*. But this was disallowed. 3 Bulstr. 182. *Moor* 850. *The Spanish ambassador v. Gifford*. But the practice in the King's Bench has continued, and is now used as *Popham* had established it; so that they always admit a render upon the return of the second *scire facias*, 2 Cr. 109; *sedente curia*, or any time before. So if *scire feci* be returned upon the first *scire facias*, then the render must be upon that return. But all the admittances of these renders are *ex gratia curiae*, and not *ex merito justitiae*; for the condition of the recognizance is broken by the non-render upon the return of the *capias ad satisfaciendum*. And therefore these renders can never be pleaded, but the party must be relieved by motion. It is said, *Litt. Rep.* 194. that by the course of the common pleas a render may be made after the return of the *scire facias*, but the court dow doubted of that, and *Cook* chief pronotary said, that the practice was always contrary. But *Powell* justice said he remembered, that Mr. justice *Twisden* cited a case in the King's Bench, where the render was made upon the day of the return of the second *scire facias*, but it was at a judge's chamber after the court was up, and that render was disallowed. But *Treby* chief justice said, that it seemed to be a good render. And *Cook* chief pronotary certified to the court, that such renders had been frequently allowed. And a rule was made to stay proceedings upon the *scire facias*. Note; It was resolved this term in *B. R.* in a case between *Conyers* and *Man* and *Rawlins*, where the bail pleaded in *scire facias* upon the recognizance, payment by the principal before the return of the second *scire facias* against the bail, that the plea was bad, for in strictness of law the recognizance was forfeited by the suing out of the first *scire facias* against the bail.

Conyers v. Man and Rawlins.
Post. 216.

Owen *vers.* Saunders.

S. C. 2 Salk.

467.

5 Mod. 386.

Carth. 426.

Lilly's Entr.

278.

Affise for the

office of clerk

of the peace

in Kent.

2 Mod. 95,

96.

12 Mod. 202.

Ibid. 356.

ASSISE *de libero tenemento* in Kent. The plaintiff made plaint for the office of clerk of the peace, whereof he was seised, until the defendant disseised him. The defendant pleads in person, that the plaintiff was never seised of an estate whereof he could be disseised, and if he was, then *nul tort nul disseisin*. The recognitors of the assise find a special verdict; they find the statute 1 Will. & Mar. st. 1. cap. 21. which enacts, that the *custos rotulorum* of the county shall nominate and appoint a fit person to be clerk of the peace *quamdiu se bene gesserit*, who by himself or his sufficient deputy should execute the said office, which act appoints an oath to be taken by him before he enter upon his office, that he hath not given &c. any thing for the said office; they find that the earl of Winchelsea was *custos rotulorum* of the county of Kent in 1689, 1 Will. & Mar. and that he then by writing under his hand and seal nominated and appointed the plaintiff Owen to be clerk of the peace *durante beneplacito*; that this was brought into the sessions of the justices of peace, and that upon the reading thereof a dispute arose concerning the validity of it, upon which the earl of Winchelsea at the next general sessions held 25 June 1690 came into the court, and without any reference to the writing said in the hearing of all present, I do nominate and appoint the said Philip Owen (*viz.* the plaintiff) to be clerk of the peace according to the act of parliament; that Mr. Owen was admitted, and took the oath according to the act, and executed the said office until September following; that the lord Winchelsea died, and the lord Sidney (now earl of Romney) was made *custos rotulorum* of the county of Kent; and that he nominated and appointed the defendant Saunders to be clerk of the peace by deed, *quamdiu se bene gesserit*; that he was qualified, and was admitted; that the defendant disturbed the plaintiff Owen in the execution of the said office, &c. This case was several times argued at the bar by serjeant Darnall and serjeant Birch, &c. for the plaintiff, and by Gould and Wright King's serjeants for the defendant; and now this term it was solemnly argued on the bench. And Powell justice for the defendant said, that he would consider four things.

1. The nature of this office.
2. If an office be grantable by parol.
3. If this grant *durante beneplacito* be good. And,

4. If the nomination of Owen by the earl of Winchelsea was good by parol.

1. And as to the first point he said, that it had been objected, that this clerk of the peace was originally but a deputy to the *custos rotulorum*, and therefore not properly an officer. But he was of opinion, that he is, and was originally an officer, and not merely a deputy to the *custos rotulorum*. The statute 12 Ric. 2. cap. 10. appoints wages for him, and there he is called the clerk of the justices of peace; and he is in nature of an attorney general to the king. In 2 Hen. 7. 2. he is called the clerk of the peace. And though it was objected, that the statute of 1 Will. & Mar. enacts, that the *custos rotulorum* shall appoint the clerk of the peace with power to make a deputy; yet that (he said) was needless, for the clerk of the peace might make a deputy by the 37 Hen. 8. cap. 1. and he does not derive his power from the *custos rotulorum*, but from the act. So that it seemed very clear to him that it is an office.

2. As to the second point he said, that the 21 Hen. 7. 37. is an express authority, that an office cannot be granted without deed, especially if it be an office for life. A steward of a court for life is not retainable without deed, but a steward may be retained for years by parol; but such a one is not properly a steward, for he cannot take surrenders out of court, but he may hold a court, or take surrenders in court. 1 Leon. 227. Godb. 142. Dier 248.

Objection. The King by parol nominated West to be clerk of the crown. 2 Andersf. 118. Dier 150.

Answer. The question there was, whether the person was capable, and not whether the King could grant without deed. And it is probable, that the party obtained letters patent afterwards. But if the case there be looked upon as an authority, that the King can grant an office for life by parol, it is an extraordinary case; for that the King cannot grant an office without deed is very manifest. And the admission there cannot make the party an officer, for that is only to admit him to the exercise of it; so that it must be supposed, that he had letters patent, or otherwise the case there cannot be law.

3. As to the third point he said, that after the statute of 37 Hen. 8. the *custos rotulorum* might grant the clerkship of the peace *durante beneplacito*, but since the new act 1 Will. & Mar. it must be for life. For though there are no negative words in this last act, Clerkship of the peace is not grantable *durante beneplacito* of the *custos rotulorum*.

act, yet because a grant *quamdiu se bene gesserit* (which this act appoints) is contrary to a grant *durante beneplacito* (which is allowed by the former act) this latter act is a repeal of the former. For where two acts are affirmative, though there are no negative words, yet the latter, being contrary to the former, amounts to a repeal of the former 11 Co. 63. *Foster's case*. And this point was resolved in the King's Bench *Pasch. 7 Will. 3.* after several arguments. For the plaintiff *Owen* obtained a *mandamus* directed to the justices of peace of *Kent*, to restore him to the office of clerk of the peace; upon which they returned this appointment to the plaintiff by the earl of *Winchelsea* *durante beneplacito*, and the court of King's Bench resolved, that no peremptory *mandamus* could be awarded; for the earl of *Winchelsea* had but a bare authority by the act, to appoint the clerk of the peace *quamdiu se bene gesserit*, and therefore not having pursued his authority, his appointment is void, and not warranted by the act.

Rex v. Owen,
4 Mod. 293.

What things
are capable of
limitation.

Objection. But he said, that it might be asked, why, if *Owen* has been admitted according to this grant *durante beneplacito*, he should not be in for life, and the words *durante beneplacito* rejected? As in 10 Co. 34. it is held, that the appointment of a master of an hospital during the will and pleasure of the appointor, where he ought to be appointed for life, was good; for the word [will and pleasure] shall be rejected as void; and when he is nominated, he is master by force of the letters patent. And why not in this case? But to this he answered, that there was a difference between the mastership of an hospital and an office. The first is in nature of an incumbency, and the master as soon as he is appointed, with his brethren, hath the whole estate in him, and may maintain a writ of right. 1 Vent. 151. And it is repugnant to appoint any limitation, for by the grant he hath the whole estate. *Dav. 45.* If the King grants, and limits no estate, it is void; but in the case of an incumbency such a grant in the King's case is good, because it is not capable of a limitation, nor is it grantable in reversion; but an office is capable of a limitation, and the grantee has no more estate in him, than it pleases the grantor to limit. And there is a difference.

What things
are not grant-
able without
deed.

4. As to the fourth point he held, that this nomination by *parol* was not good, for he said, that it is a rule in law, that incorporeal real estates will not pass without deed. Uses at common law might be created by *parol*, because the law took no notice of them, but since the statute no use will arise by *parol*. *Pop. 47.* In some cases offices are grantable without deed, as where in corporations the officers are elected, because the election is notorious enough.

but where the mayor of a town, or a particular person, has power to nominate an officer, it ought to be by deed.

Objection. That in this case the *custos rotulorum* had but a power, and this might be executed at common law by *parol*; as where an executor had had lands devised to him to sell, he might sell by *parol*. 9 Hen. 6. 23. Co. Li. 113. a.

Answer. The executor might sell in that case by *parol*, because the grantee was in by the will, and had no need to make a title by the executor, but might plead that he was in by the will, and give the power in evidence. But in this case no man can make a title by the act of parliament, but must shew in pleading that the *custos rotulorum* appointed him. But a power cannot be always executed by *parol*, for the King has no office in him, but a power to grant and nominate, yet this must be by deed; and why not in the case of the *custos rotulorum*?

Objection. A presentation may be by *parol*. Co. Li. 120. a. Cro. 247.

Answer. That is but a bare nomination, and the bishop for good cause may refuse. But in the case of a donative it must be by deed. Fitzb. N. Br. 33. b. The same law in the case of the mastership of an hospital. And the reason is, because it carries a freehold incident to it. Now the grantee of this office has a freehold, and so it was adjudged Pasch. or Trin. 5 Will & Mar. Harcourt v. Fox, where the case was thus; the earl of Clare being *custos rotulorum* of the county of Middlesex, appointed Harcourt to be clerk of the peace for that county *quamdiu se bene gesserit*, and afterwards the earl of Clare was removed, and the earl of Bedford made *custos rotulorum*, who nominated Fox; and it was adjudged in the King's Bench, that Fox was not well nominated, because Harcourt being nominated to hold this office *quamdiu se bene gesserit*, his office did not determine by the removal of the *custos rotulorum*, but it would have done before the statute of 1. Will & Mar. and this was affirmed in the house of lords. In auditor Curle's case, Co. 34. the words of the act were, that the King should name, and resolved, that it must be under the great seal of England. And it is all one with the word grant. And though it has been objected, that this was, because the King is tied to circumstances of the dignity of his person. Answ. That was not considered at all in the case. If A. devises Dale to such person as the King shall name, here the King may nominate by *parol*; so the King may present to a church by *parol*, because the presentee is in institution and induction. Quare imp. 60. So the King may

T t

retain

Harcourt v. Fox. Clerk of the peace has a freehold. Case, in Parl. 158. 4 Mod. 167.

retain a chaplain by *parol*. *Moor* 233. 3 *Cro.* 424. But where there is an interest derived from him it cannot be by *parol*. And the King has the same power in taking as in giving, 7 *Co.* 12.

But if there is a bare power in any one, this may sometimes be executed without deed; as where the chief justice of the Common Pleas appoints an officer, if a *memorandum* be made of it, it will suffice. But that is not like our principal case. Besides that the inconvenience will be great, if a freehold be suffered to pass by *parol*; for then a nomination at dinner, or at drinking, will be sufficient to transfer a freehold, which will be inconsistent with the rules of law, which require greater solemnity in passing such estates, to the end that the fact may be notorious; which design of the law, if this be permitted, will be totally frustrated: For which reasons he concluded, that judgment ought to be given for the defendant.

But against this it was argued by *Treby* chief justice, and *Nevill* justice, for the plaintiff. And *Treby* chief justice said, that he would consider, whether the grant by deed was good.

1. As to the first he said, that he would submit to the resolution of the King's Bench in the case of *Rex v. Owen* upon the *mandamus*, that it was not good; though it seemed to him, that 10 *Co.* 34. was against that resolution; for here the words [during pleasure] will be void, as they were there; and the distinction which his brother *Powell* had made, would not aid it; for in this case that nomination by the *custos rotulorum*, since the statute has enacted that it shall be *quamdiu se bene gesserit*, is as incapable of any other limitation, as the mastership of the hospital was.

2. But as to the second point he was of opinion, that judgment ought to be given for the plaintiff, because the nomination was good by *parol*. And he said, that he would consider,

1. What a grant is.
2. What a nomination is.
3. This office. And,
4. Authorities and objections.

Grant, what? 1. As to the first, he said, that a grant is a gift in writing, by which an incorporeal freehold, &c. ought to be conveyed, as rents, &c. *West's Symboleogr.* 1. part 2. And corporeal inheritance

ces were passed by livery and feoffment. All inheritances according to the general rule may pass by one of these means, and the law has not appointed a third. But the King in respect of his person must grant by letters patent, and cannot make a feoffment by *parol*.

2. As to the second, nomination is a declaration by words, ^{Nomination, what?} whether the words be in writing or spoken. If *A.* grants a lease to *B.* for so many years as *J. S.* shall name, *J. S.* may nominate by *parol*. *Plowd. 6. b.* Custom that the lord admiral may nominate and appoint by *parol* a register of the admiralty court, is good by the opinion of the court. *Dier 152. pl. 9, 10, &c. Bendl. 50. pl. 89.* If a nomination by *parol* is good by custom, *a multo fortiori* it is good in case of an act of parliament. Then it is here, as much as if the act had said, that the nominee of the *custos rotulorum* should have the office during his life; so that after the *custos rotulorum* has nominated, the nominee is in by the act.

3. The original of this office of *custos rotulorum* is not very clear; ^{Office of custos rotulorum. Act. 150.} but in probability the trust of the conservation of the rolls was committed to one of the justices of the peace, and then he was called *custos rotulorum*; and probably by the consent of his brethren he nominated the clerk of the peace. He is called so 13 *Hen. 4. 10. pl. 33.* And in *Dier 175. b.* it is said, that it seems in reason, that justices were before clerks. 12 *Ric. 2. cap. 10.* calls him clerk of the justices, and appoints him wages. 2 *Hen. 7. 1.* first makes mention of the *custos rotulorum*; then comes the 11 *Hen. 7. cap. 15.* and appoints two justices of peace to controul the estreat of the sheriffs, who ought to be named by the *custos rotulorum*.

Before the 37 *Hen. 8. cap. 1.* the clerk of the peace was constituted by *parol* only, and that without deed, as the preamble implies by the use of the words [nominate and appoint.] When the preamble mentions the King, it makes use of the word [grant] when of the *custos rotulorum*, it makes use of the words [nominate and appoint;] which, as before is shewn, is by *parol*. The *custos rotulorum* might nominate the clerk of the peace for a less time, than he was *custos rotulorum*, but not for a longer time; and the *custos rotulorum* himself was but at the will of the King. And after this statute of 37 *Hen. 8.* he might be nominated by *parol*, or at least the one way or the other, for acts of parliament ought to be taken in the vulgar sense.

The statute of 1 *Will. & Mar.* makes use of the words [nominate and appoint,] which ought to be expounded according to the exposition

exposition of the common law; so that now since the new statute nomination by *parol* is good, for the act had no design to alter the constituting of this officer, in which the word [grant] is omitted, and perhaps *de industria*. And this way of nomination continued, notwithstanding that it is now made a freehold.

4. The common law allows nomination by *parol*, and especially of under officers. *Dier* 114. *b.* *Vaux* the filazer was discharged by *parol*, though it seemed to him, that this was hard. The chief justice, who is in by grant of the King, by custom may nominate a clerk, &c. who may have a greater estate than the grantor. So it was in the case of the register of the court of admiralty. When a statute makes use of words, which have relation to a custom, they ought to be interpreted accordingly, as if the custom came in question, it should be interpreted. And therefore the statute of wills inserted the words [in writing] for otherwise a devise by *parol* would have passed lands, as they were passable by some customs before. So in this case the statute uses the words nominate, &c. and therefore it ought to be construed as the common law would construe it, which is by *parol*.

Besides, where an officer can constitute another officer, who is to continue in his office for longer time than he who constitutes him is to continue in his; this must be by custom or act of parliament. For by the common law no man can grant the accessory, for longer time than he hath interest in the principal. *1 Roll. Abr.* 511. But by virtue of a custom or statute he may. As the chief justice of the Common Pleas may nominate an officer, who shall be in for his life; or the lord of the manor for one day may grant, and the grantee by the custom shall be in for his life. Therefore in this present case the clerk of the peace after nomination is in by the act; and without doubt an act of parliament is not inferior to a custom in efficacy. But it has been proved before, that freeholds and inheritances will pass by custom without deed by *parol*; as where lands are devised by custom, there is no livery to pass them, nor deed; for though there is a will, yet it is no deed. So the clerks of assise are not officers by *Westm.* 2. but by custom, nor can they be in by grant, for they have a freehold, while the justices have but an estate at will.

2 Inst. 425.

Objection. That in that case the justices grant the clerkship of assise by deed.

Answer. A writing sealed and delivered may be part of a custom, and yet may not be absolutely necessary. *Rast. Quare impedit, Prochein avoidance* 1. If a custom than has so much power, much

much more has an act of parliament; and since the legislators have omitted the word grant in this act, the court ought not to put it in.

As to the admission, he did not believe that necessary, because the act makes no mention of it; nor is the entry upon record more material, than as it amounts to an evidence.

As to *Dier* 150. 2 *Andersf.* 119. he said, that though they were authorities for him, yet since it was but a single case, he did not rely much upon it.

Objection. The words of the act in auditor *Curle's* case were nominate and appoint, and yet the King executed it by grant.

Answer. Where the King, his heirs or successors may nominate, this raises an inheritance in them, and they may well derive an estate of inheritance out of them; but that does not hold place in our case, and therefore the cases differ.

Objection. It is not policy to permit freeholds to pass without solemnity, &c.

Answer. It is true, that *Doctor and Student*, *Perkins*, *Littleton* and *Coke*, seem to say so; but yet a rent may be assigned for dower by *parol*, or rent for *owelty* of partition. *Perk. sect. 62. Co. Li. 134. b. 169. Hob. 153. Littlet. sect. 251, 2.*

Objection. *Non constat* to what act of parliament the earl of *Winchelsea* referred himself.

Answer. It must be intended the first of *Will. & Mar.* for that act in effect, as to this purpose, repeals the act of *Hen. 8.* (which point *Powell* justice agreed.)

And for these reasons, by the opinion of these two judges against *Powell* justice, judgment was given for the plaintiff.

Note, that *Powell senior* justice was strongly of this opinion of the chief justice upon the argument of the case at the bar; but he died before this resolution was given.

Afterwards error was brought upon this judgment in *B. R.* where the case was argued several times. And afterwards *Holt* chief justice pronounced the opinion of the court. 1. That the *custos rotulorum* may appoint the clerk of the peace by *parol*. For when

when the act of 1 *Will. & Mar.* says that the *custos rotulorum* shall appoint, and he does it accordingly, it is but the execution of a power, and not properly a grant; for every grantor should have an interest to grant, but the *custos rotulorum* has no interest, at most but at the will of the King, and therefore he cannot transfer an estate for life. Tenant for life of a manor or park makes a bailiff or parker for life; it must be by deed, because it is a grant; but it is determined by the death of the tenant for life. If a man makes leases for three lives, there must be livery; but if tenant for life with power to make leases for three lives makes a lease accordingly, livery is not necessary. If a man devises, that his executors shall sell land, &c. sale may be made without livery. The same law if a man devise that his executors shall grant a rent, they may do it without deed. *Co. Lit.* 113. Many corporations have power to make a town clerk, and they create him by election; and the town clerks have freeholds, and may have assize, if they are disturbed. (Note, that Mr. *Crispe* said that in *London* they create the town clerk under the common seal, but *per Holt* it is not necessary.)

2. No law requires nomination to be by deed. And *Dier* 150. is a case in point, that [nominate] does not import a grant by deed in a custom, much less does it import it in an act of parliament. But, 2. All the court was of opinion, that this was not a good appointment. 1. Because it does not say, that the earl of *Winchelsea* appointed Mr. *Owen* to be clerk of the peace of the county of *Kent*, nor in truth of any other county. Objection: These words must be expounded according to the circumstances. Answer: That will be dangerous to the plaintiff, for then notwithstanding the finding of the jury these words must refer to the deed. 2. He nominates *Owen* clerk, according to the act of parliament. The act appoints three things to be done. 1. To appoint the officer. 2. To limit the estate. 3. To shew how it shall or may be executed, *viz.* by deputy. Now here the *custos rotulorum* has not done any one of them, and therefore this being a bare authority not pursued is void. 3. It is uncertain what act the *custos rotulorum* intended, for there are two of them, that of *Hen.* 8. and that of *Will. & Mar.* 4. The verdict is contradictory, for the words [do nominate and appoint the said *Philip Owen*] must refer to the deed, for no *Owen* is mentioned before but him. And therefore for these reasons all the court were of opinion, that this judgment ought to be reversed; and the judgment was reversed accordingly *Trin.* 10 *Will.* 3. *B. R.* And afterwards upon error brought in parliament in *Hilary* vacation 1699, this last judgment was reversed, and the judgment of the common pleas affirmed for the benefit of Mr. *Owen*, who died within three or four days after this judgment was given in parliament.

Kempe *vers.* Crews.

Intr. Hil. 7 Will. 3. C. B. Rot. 1684.

TRespafs for his close broken, called *Broadclose* in *Devonshire*, S. C. Lutw. 1573. and for taking and impounding three cows, &c. To all, Distress for rent. besides the taking and impounding, the defendant pleads not guilty; and as to that, he says, that he was possessed for a long term of years of the place where, &c. that he demised to *Williams* for part of the term, rendring rent; and for rent arrear he took the cattle in the place where, &c. as a distress, &c. The plaintiff replies, that the cattle were not *levant* and *couchant*; upon which issue is taken, and verdict for the plaintiff. And *Darnall* serjeant moved for a *repleader*, because this was an immaterial issue. For if the cattle were upon the land, though they came by escape, they may be distrained for rent, though they were not *levant* and *couchant*. Cro. Jac. 300. Lev. 260. 2 Vent. 50. 2 Vern. 129, 131. Chan. Preced. 7, 8. 10 Mod. 4. Ro. Abr. 668. *Co. Li. 47. b.* But if this rule is laid too general, yet this difference will reconcile all the books; if the cattle are trespassers upon the tenement, the lessor may distrain them for rent, though they were not *levant* and *couchant*; but if they enter into the land by the tenant's default, because the fences were not repaired, there they must be *levant* and *couchant*, before they are liable to a distress for rent. 41 Edw. 3. 26. b. 22 Edw. 4. 49. 1 Roll. Ab. 668. takes notice of these books and others, and seems to make this distinction.

Gould King's serjeant for the plaintiff: The issue is not immaterial. For though *Coke* lays down a rule, that cattle which come upon the land by escape may be distrained for rent, yet the books there cited do not warrant this opinion. For the difference is between an ancient seignory and a rent *de novo*. All the books that *Coke* cites are of an ancient seignory, and there the lord may distrain what he finds upon the land, though the cattle have not been *levant* and *couchant*. And it is reasonable, because the lord has no other remedy but distress, for he cannot have an assise until the tenant makes rescous, &c. Besides, that ancient services were small, and for this reason the mischief was not so great. But on the other hand it would be very mischievous, if the lessor might distrain the cattle of a stranger, before they were *levant* and *couchant*. For if a man reserves a rent greater than the value of the land, it would be unreasonable that the cattle of a stranger coming in by escape should be responsible for it. Besides, that in this case the lessor might have debt against his lessee, but the lord could not have debt against his tenant. And this difference is warranted by *Dier* 317.

Colwell v.
Milnes,
Lutw. 1578.

3 Cro. 549. by *Walmesley*, and 2 Leon. 7. by *Mamwood*. And *Doctor and Student* cap. 7. fol. 15. expressly contradicts *Co. Li.* 47. b. And *Palm.* 43. *Lacy's* case says, that when cattle escape, and the owner retakes them upon fresh pursuit, there they are not distrainable for rent; otherwise if they had been *levant and couchant*. In *Hil.* 20 & 21 Car. 2. C. B. Rot. 1770, *Colwell v. Milnes*, a case in point. There the plaintiff brought trespass for the taking of his horse; the defendant justified the taking of it for a distress for arrears of rent incurred upon a demise by the defendant of the place where, &c. to the plaintiff; the plaintiff replied, that the horse was not *levant and couchant*; issue thereupon, and verdict for the plaintiff; and *Pasch.* 21 Car. 2. serjeant *Seys* moved in arrest of judgment, that this was an immaterial issue; and then, *absente Wild* justice, the court seemed to incline to that opinion; but *Trin.* 21 Car. 2. *Wild* being present in court, the plaintiff had judgment by the opinion of the whole court.

Verdict upon
an ill colla-
teral issue.

Distress for
services.

But admit that this had been ill upon demurrer, yet since here the defendant has taken issue upon the replication, and verdict is found for the plaintiff, the defendant has slipped his opportunity, and the plaintiff shall have his judgment. And he cited 2 Roll. Rep. 241, *Gwyn* vers. *Davenport*, and 2 Cro. 44, *Francis* vers. *Tringer*, to prove, that a collateral issue being taken and found for the plaintiff, though the issue is not good, yet the plaintiff shall have his judgment, because the defendant should have avoided the ill replication by pleading. And in *Michaelmas* term last past *Powell* justice was of opinion, that in case of an ancient feignory the lord may distrain cattle for the services, which came in by escape, though they were not *levant and couchant*, although it be in default of the fences, which the tenant of the land ought to maintain, because the lord has nothing to do with the repairing of the fences. But in case of rent reserved upon a lease for years the lessor cannot distrain such cattle, until they be *levant and couchant*; for if the lessor had had the land in his own hands, he ought to have repaired the fences; and when he puts in a lessee, he ought by covenant, &c. to oblige him to repair. And therefore in that case if the law would allow the lessor to distrain the cattle of a stranger, which come in by escape, before that they be *levant and couchant*, it would be in effect to allow a man to take advantage of his own wrong. Therefore the opinion of *Coke* cannot be maintained so generally, no book warranting it, unless 10 Hen. 7. 21. b. Therefore it must be intended, that if the cattle come in by default of the owner of the cattle, then they may be distrained, before they be *levant and couchant*. 7 Hen. 7. 1. 15 Hen. 7. 17. but if in default of the tenant of the land, there they cannot be distrained until they have been *levant and couchant*; that is to say, for rent upon

upon leases for years. 15 Hen. 7. 17. And in such case the lessor shall not take the cattle, before that he has given notice to the owner that they are upon the land liable to his distress. And if the distrainer chase cattle in a place liable to his distress, and gives notice to the owner of the cattle, and he does not come to take them away, they are now become distrainable. But in case of distress by the ancient seignory aforesaid, the owner may prevent the distress by making fresh pursuit. 15 Hen. 7. 17. 2 Roll. Rep. 124. *Gill v. Gawen*. But in this case nothing appears of any default in the fences; but the plaintiff has only replied, that the cattle were not *levant* and *couchant*; but he should have gone on, and shewn the default in reparations by the tenant; and then if the verdict had been for the plaintiff, he would have had his judgment. But now the justification of the defendant is *prima facie* a bar; to defeat which the plaintiff only says, that the cattle were not *levant* and *couchant*; which may be true, and yet the justification good; for notwithstanding any thing that appears in the case, the cattle were distrainable, though they were not *levant* and *couchant*. And therefore it seemed to him, that the issue was immaterial. But he said, that it might be a question, whether it was not aided by the statutes of jeofailes? for if it has but the semblance of an issue, it shall be aided; and that might be the reason of the judgment in *Colwell* and *Milnes* case.

But *per Treby* chief justice, where the cattle escape accidentally, there they are not distrainable, until they have been *levant* and *couchant*; but if they escape by default of their owner, they are distrainable the first minute. But in this case it does not appear, by what means they came into the plaintiff's land. Therefore since the defendant has taken issue upon the levancy and couchancy, it must be intended after verdict against him, as much as if he had said that he will admit that they came in by such means, whereby the levancy and couchancy should be material, to intitle him to the distress. But if the defendant had demurred upon the replication, then it must have been taken more strongly against the plaintiff, and then it would have been ill. Or otherwise the defendant might have rejoined, that the cattle came in by the plaintiff's default. But now after this issue it shall be taken more strongly against the plaintiff. And (by him) if a *repleader* is to be awarded, the replication shall not be set aside, but only the first jeofaile, which was the taking of issue upon it by the defendant. But (*per Powell* justice) the replication is part of the issue, and ought to be set aside if a *repleader* is granted; for when a *repleader* is awarded, no error ought to be left upon the record. And therefore if the declaration be good, and the bar, replication and rejoinder ill, if a *repleader* be awarded, all ought to be set aside but the declaration.

X x

And

Repleader.
6 Mod. 1, 2, 3.
3d and 6th
resolutions in
Staple v.
Haydon.

And judgment was given for the plaintiff, unless cause should be shewn to the contrary the first day of this *Hilary* term. At which day *Darnell* argued, as he had argued before, that this was an immaterial issue, and that upon a *repleader* they ought to begin where the first fault is made, and that is where the immaterial issue is tendered, and not where it is taken. 21 *Hen.* 6. 14. 7 *Hen.* 7. 3. 22 *Hen.* 6. 19. *Long* 5 *Ed.* 4. 108. *Bro. Repleader* 18, 21, 31, 35. And he said, that the difference is, that if the verdict passes against him who made the first fault in pleading, there no *repleader* shall be granted; but it is otherwise if it passes for him: which distinction is warranted by 15 *Hen.* 7. 4. *Bro. Repleader* 23, 24. 24 *Hen.* 6. 57. *Hob.* 112. *Tasker* v. *Salter*. Now in this case the plaintiff made the first fault in pleading, and the verdict passed for him, and therefore a *repleader* is grantable. And the reason, why it was denied in the case of *Cokwell* and *Milnes*, might be because the plaintiff perhaps prayed it himself, because he did not think the damages good that were given him; but here the defendant prays it. But it was adjudged by the whole court, that no *repleader* should be awarded. For it is not totally an immaterial issue; for perhaps the defendant chased the cattle upon the land liable to his distress, and then levancy and couchancy is material; and the court will intend, that it was so after a verdict. And therefore judgment was given for the plaintiff.

Bellasis vers. Burbriche.

S. C. 1 Salk.
209.
Lutw. 213.
S. C. 3 Salk.
136.
Post. 280.

CASE for *rescous*. The plaintiff declares, that he the 20th of March 1692. demised a mesuage and lands lying in *Holme, Berkley*, and *North B.* in *Yorkshire*, to *Robinson*, for one year, and so from year to year, *quamdiu ambabus partibus placuerit*, rendering 12 *l.* per annum rent, so long as the lessee should occupy the premises; that *Robinson* *virtute dimissionis intravit, et fuit inde possessionatus*; and that the plaintiff the 20th of November 1694. seized five quarters of barley, &c. *in et super praemissa dimissa nomine districtionis*, for rent of one year and a half ending at *Michaelmas* 1694. and that the plaintiff impounded this corn in *quodam horreo praemissorum*, and had a design to sell it according to the statute; but the defendant the 26th of November at *Holme* aforesaid the corn in the barn being did rescue and carry away. Not guilty pleaded. Verdict for the plaintiff. And in *Michaelmas* term last past *Wright* serjeant moved in arrest of judgment divers exceptions.

1. Exc. That the plaintiff has not said, that he gave notice of this distress, and without notice he could not sell it by the statute. *Sed non allocatur.* For the plaintiff does not say that he sold it, for the rescue prevented the sale, but that he intended to sell; so that if the defendant had not rescued the corn, the plaintiff might have given notice sufficient to make legal sale within the intent of the act.

2. Exc. It appears that the plaintiff distrained for the rent of a Lease. year, after the year was determined, which he could not do, since it was but a lease at will. *Sed non allocatur.* For it was a good lease for two years, and after that at will. 5 Co. 35. b.

3. Exc. It does not appear, when the tenant entered, or how Occupation: long he occupied. *Sed non allocatur.* For in case of leases for years the rent becomes due from the lease, and not from the entry; and he has no need to aver occupation, because the lessee is liable to pay the rent, whether he occupies or not. But in case of leases at will occupation must be averred.

4. Exc. In this very lease the words are, rendring rent so long as the lessee shall occupy; and then *modus et conventio vincunt legem.* *Sed non allocatur.* For since it is said, that the lessee entered *virtute dimissionis et fuit possessionatus*, it shall be intended after verdict, that he occupied for so long time as the plaintiff has declared, that the rent was arrear.

5. Exc. That there is not here any good venue, for the demise Venue. is laid in three viles, *Holme, Berkley, and North B.* and the plaintiff says, that he took the corn *in et super dimissa praemissa*, which extends to all the three, and that he impounded it *in quodam horreo praemissorum*, which also extends to all the three; and the whole is in issue, as well the demise, taking, &c. as the rescue, and therefore the venue ought to come out of all three. And this is warranted by 3 Cro. 620. *Action v. Barham*, which is a case in point. And it is manifest, that the demise, &c. are in issue, for if there is no demise, then there cannot be any rent, if no rent no distress, if no distress no rescous. 2. This is not aided by the verdict by 21 Jac. 1. cap. 13. because it is a penal action, and penal actions are excepted out of that act. It is a penal action, because treble damages are given in it by the new statute, which were not recoverable by the common law. And it is such a penal action as the statute of jeofails has no design to aid, as appears by 16 & 17 Car. 2. cap. 8. where debt for tithes is excepted out of the proviso, by which it appears, that the parliament was of opinion, that otherwise

5 Co. 36. b.
Baynham's
case.

Penal action.

Costs in penal
action.

otherwise debt for tithes would have been within the proviso, and thereby excluded from the benefit of that act, for the preventing of which they excepted it out of the proviso. Now this action is not less penal than the action of debt, and consequently is within the proviso, since there is no exception to exempt it. And as to this point, the whole court was of opinion, that it was a penal action. But *Powell* justice said, that it would be a question, whether penal actions should be construed to extend to cases where the party grieved brings the action, or whether it should be extended only to common informers. It was adjudged in this court *Trinity* term last, that where the party grieved brings the action upon a penal law, he shall have costs, if he recover, but *contra* if it be brought by a common informer. But as to the exception of the venue, *Lutwyche* serjeant argued, that the venue was well laid, for which he cited 3 *Cro.* 619. *Sydenham v. Robins*, case for obstructing of a way; the plaintiff declares, that he was seised in fee of a house in *D.* and that he and all those, &c. had a way over the defendant's close in *B.* &c. Not guilty pleaded; the venue was from *B.* and objected, that it ought to have been from both vills; but adjudged good, for upon not guilty pleaded, the obstruction was properly in issue; but if the issue had been upon the prescription, it had been otherwise. And *Noy* 9. *Banning's* case. But this *Hilary* term the court gave their opinion, that the venue was well enough. For though the demise, (which was of land in *Berkley, Holme, and North B.*) rent, distress, &c. were in issue at the trial, and ought to be proved; yet the principal affair in question, for which this action was brought, was the rescue, which was at *Holme*, and from thence the venue came well enough. And they cited *Hob.* 305. *Hutt.* 39. *Clerk v. Wood.* 2 *Cro.* 513. *Dalton v. Barnard.* 3 *Cro.* 751. *Leed's* case. But *Treby* chief justice said, that he had a manuscript report of the case in 3 *Cro.* 619. 2 *Roll.* 614. and that by his report, which was much preferable to the printed books, that judgment was arrested. But in the principal case judgment was given for the plaintiff for the reasons aforesaid.

Hool *vers.* Bell.

S. C. Lutw.

1227.

Executor of a
tenant for life
of a rent-
charge may
distrain for ar-
rears incurred
in the life of
the tenant, by
32 Hen. 8.
cap. 37.

REplevin for horses taken by the defendant in a place called *The stable* in *Yorkshire*. The defendant made consuance as bailiff to *Robert Knowles*; and shews, that the lord *Stafford* was seised of the manor of *Tinsley* in *Yorkshire* with the appurtenances in fee, whereof the place where, &c. is parcel, and being seised, the sixth of *March* 29 *Car.* 2. granted to *Francis Knowles* a rent-charge of 60 *l.* per annum payable yearly, with clauses of distress, in

see Co. Litt. 162. a. 4. in notes 913. e. d.

in the manor of Tinsley, for life, &c. that Francis Knowles made his will, and made his brother Robert Knowles his executor, and died; that Robert Knowles proved the will; and that for arrears of this rent-charge, incurred in the life of the testator, the defendant, as bailiff to Robert Knowles, took these horses in the place where, &c. as a distress, as in parcel of the lands and tenements *praedictis* Roberto Knowles ut executori Francisci Knowles secundum formam *statuti oneratorum et obligatorum*. The plaintiff demurred. And Pemberton serjeant for the plaintiff argued, that this avowry was ill; for the executor of tenant for life is not within the statute of 32 Hen. 8. cap. 37. For the statute recites, that, forasmuch as executors had no remedy by the common law for arrears of rent; this act gives them a double remedy, viz. distress or debt. But the executors of tenant for life had debt at common law for rent incurred in the life of the testator. And therefore *Co. Lit.* 162. says, that tenant for life must be intended tenant *pur auter vie*, so long as *cestuy que vie* lives, in this act. So *Cro. Car.* 471. *Turner v. Lee*, the judges laid down a rule, that where the executor, &c. had remedy by debt at common law, this statute did not give him distress. Therefore in the principal case the executor having remedy by debt by the common law for the arrearages in the time of the testator, who was tenant for life, he has no remedy by distress given by this act. *Sed non allocatur*. For *per curiam*, this act of 32 Hen. 8. is a remedial law, and shall extend to the executors of all tenants for life; and the law has been taken so always since the statute, and has never been questioned. And the words of the statute are general enough to extend to all. And in 3 *Cro.* 332. *Lambert v. Austin* this seems to be admitted, and therefore the rule in *Cro. Car.* 471. so generally taken, cannot be law.

2. Exc. The defendant has not averred, that the place where, &c. was in the seisin of the plaintiff, before these arrearages incurred; nor that the plaintiff claims by, from, or under him, who was tenant, and ought to have paid the rent, and by failure of this averment he hath put himself out of the benefit of the act; for the act gives the distress only against him who was tenant of the land, when the rent incurred, or against those who claim by, from or under him; and that such averment is necessary, 3 *Cro.* 547. *Miles v. Willoughby* is express, and the cases of *Andrew Og-* 2 Jones 60. *mel*, and *Edriche*, must be supposed to have had special averments, though the pleadings do not appear in the books.

But as to this exception, *Lutwyche* serjeant argued, that the thing in its nature does not require a precise averment, because it does not lie in the conscience of the avowant, who was tenant

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when

Estate-tail
shall be pre-
sumed to con-
tinue.

Averment.

when the rent incurred, but more properly in the conscience of the plaintiff. Besides that the defendant has shewn, that the lord *Stafford* was seised in fee. Now an estate-tail shall be presumed to continue, unless the contrary appear. *Plowd.* 193, 431. much more shall a fee be presumed to continue. A precise averment is not necessary, as appears by the case of *Miles* and *Willoughby*, 3 *Cro.* 547. For there it being laid, that the heir of the devisee was seised, *et adhuc seifitus existit*, it was held well enough. Now the defendant has said, that the place where, &c. was *onerat. et obligat.* to the distress of the executor *secundam formam statuti*, which necessarily implies continuance in the hands of any one, who claims under the grantor. And this *Hilary* term, after several arguments at the bar, the court gave their opinion, that the avowant has no need to shew that the land was in the seisin of the plaintiff; or that the plaintiff claims by, from, or under, him who was tenant when the arrearages incurred; but it is more natural, that the plaintiff (in case he is not liable) shew how he is not liable. The case of *Miles* and *Willoughby* is an authority, that a precise averment is not necessary; and as that case is reported 2 *Roll. Rep.* 370. in *Hungerford* and *Harriland's* case, it is said, that a general averment was adjudged good. Now a general averment is not traversable by the plaintiff, for that would put such an issue upon the avowant as he could not prove. Therefore in such case the plaintiff should have pleaded over, and shewn, what estate he had had; upon which the avowant might take issue. But the better way is, that the plaintiff, if he is not liable, shew how he is not liable as aforesaid. And there is no precedent, that the avowant ought to make such an averment. 3 *Cro.* 332. 8 *Co.* 64. b. *Foster's* case. 2 *Brownl. Ent.* 238. *Poole v. Berwick*. Judgment there given for the avowant without such an averment. *Winch Entr.* 1015. And if the case of *Andrew Ognel* had such averment, as was supposed by the council at the bar, (the record of which case cannot be found) yet it would be but one precedent against many. And therefore judgment was given by the whole court for the avowant.

Grace Faux *vers.* Barnes.

Intr. *Trin.* 8 *Will.* 3. Rot. 1761. C. B.

Trial by
proofs.

DOwer. The tenant pleaded that the demandant's husband was in life. And issue thereupon. And it was tried in court by witnesses. And the court said, that very small evidence would be sufficient in such case.

Soper

Soper *vers.* Dible.

Assumpsit upon a bill of exchange. The plaintiff declares, that *secundum consuetudinem et usum mercatorum* the acceptor is bound to pay, &c. without shewing the custom at large. And the defendant demurred. And it was adjudged for the plaintiff. And *per curiam*, it is a better way, than to shew the whole at large.

Declaration upon a bill of exchange. *Poss. 281.*

Pinkney *vers.* Hall.

CASE. The plaintiff declares, *quod infra hoc regnum Angliae* S. C. : Salk. there is, and time whereof, &c. hath been a custom, that if two merchants are partners jointly merchandizing together, and the one of them subscribes a bill for the payment of money by him and his partner mentioned there to another or his order, that then both the partners are bound by the subscription of that single person; and that if the person, to whom this bill is payable, indorses it payable to any other person, that then those partners ought to pay such bill upon notice, to him to whom it is made payable; then the plaintiff shews, that J. S. and the defendant Hall were partners jointly merchandizing; and that J. S. subscribed a bill of 100*l.* payable to Hutchins or his order by himself and his partner, and that Hutchins indorsavit billam praedictam solubilem to the plaintiff, that the defendant had notice thereof, and upon demand did not pay, &c. The defendant demurred.

Two joint traders, the one subscribes a bill for payment of money by himself and his partner. 2 Vern. 292, 277. Sty. 370.

1. Exc. That the declaration being *per consuetudinem Angliae*, Custom of &c. was ill, because the custom of England is the law of England, of which the judges ought to take notice without pleading. *Sed non allocatur.* For though heretofore this has been allowed, yet of late time it has always been over-ruled; and in an action against a carrier it is always laid *per consuetudinem Angliae*, &c.

2. Exc. Though *lex mercatoria* is part of the law of England, yet it is but a particular custom among merchants; and therefore it ought to be shewn in London or some other particular place. *Sed non allocatur.* For the custom is not restrained to any particular place. And *Hardr.* 485. it is laid as here.

Lex mercatoria.

3. Exc. It is not said, that the said J. S. promised for the defendant and himself upon the account of trade, and it may be, that it was for rent for some other thing, for which the partner is not liable. *Sed non allocatur.* For the plaintiff having declared so specially

specially upon the custom, it shall be intended, this was for merchandizing, especially since the defendant has demurred generally. And if the case had been otherwise, the defendant might have pleaded it.

Indorsement
of a bill of ex-
change
pleaded.

4. Exc. That the declaration is, that *Hutchins indorsavit billam praediſtam ſolubilem* to the plaintiff, which is nonsense, for it ought to be, that he indorsed the bill, that the defendant should pay, &c. *Sed non allocatur.* And judgment given for the plaintiff.

Cook *verſ.* Beal.

Damages in-
creased by the
court.

3 Salk. 115.
S. C.

TRespass, assault and battery. The plaintiff declares, that the defendant *cum manu sua ipsum Thomam Cook super sinistrum oculum percussit et violavit ita quod* the said Thomas Cook, viz. the plaintiff *penitus inhabilis devenit ad scribendum vel legendum*, being an officer of the excise, &c. Not guilty pleaded. Verdict for the plaintiff. And Birch serjeant moved, that the court would increase the damages, upon affidavit that the plaintiff had lost his eye. But the court ordered the plaintiff to appear in court in person, for otherwise they said, that they could not increase the damages; upon which the plaintiff was brought into court. And afterwards the court after several motions resolved,

1. That if the word *mayhemavit* is not in the declaration, yet if the declaration be particular, so that it appears by the description, that the wound was a maim, it is sufficient, and the court may increase damages. *Rast. appeal* 46. 8 Hen. 4. 21. b.

T. Jones 183.

1 Roll. Abr.

573. L. pl. 4.

2. Resolved, That the court may increase the damages if the wound be apparent, though it be not a maim. And so it was done in the case of lord Foliot. Therefore in this case, because the wound is visible, though it be no maim (for it is not a maim because the eye is not wholly out, but the plaintiff only declares, *quod inhabilis ad legendum vel scribendum devenit* by the wound) yet damages may be increased. And Powell justice said, that Holt chief justice was of that opinion. So (*per Powell justice*) though the loss of a nose is not a maim, to bring an action *felonice* for the loss of it, yet the court may in such case increase the damages. And he said, that the court might increase the damages upon a writ of inquiry, because that was but a bare inquest of office. *Stile* 345. 1 Leon. 139. *Bendl.* 158. *Littlel. rep.* 51. *Hutt.* 121. 53. 1 Sid. 423. 1 Mod. 24. were cited, and a case between *Swalley and Babington*, where in a general action of assault, battery, and wounding, upon view the damages were increased about four years ago, upon the motion of serjeant Lovell.

Swalley v.
Babington.

3. Resolved, That the justices of *nisi prius* could not increase the damages; but if evidence be given of a great wound, they may indorse it upon the *postea*, and upon that certificate the court here will increase the damages. 8 Hen. 4. 23. *Latch* 223. *Hooper vers. Pope*, where there was neither *mayhem* in the declaration, nor the wound described specially; yet it being indorsed upon the *postea*, that evidence was given of a wound, the damages were increased upon the view. 39 Edw. 3. 20. b. 22 Edw. 3. 11. *Stile* 314. *Hardr.* 408. But *per Powell* justice, if the cause be tried before a judge of the same court, where the motion is made to increase the damages, there is no need to have any indorsement upon the *postea*. (Note, This cause was tried before himself.) The damages in the principal case were increased to 40/.

Note, In the argument of this case *Darnall* serjeant said, that Justification in *son assault demesne* was adjudged a good plea in *mayhem*. But *per mayhem*. *curiam*, a man cannot justify a maim for every assault, as if *A.* strike *B.* *B.* cannot justify the drawing his sword and cutting off his hand; but it must be such an assault, whereby in probability the life may be in danger. Afterwards 2 *Annae*, in an action of *mayhem* *Cockroft v.* brought by *Cockroft* attorney against *Smith*, the defendant pleaded, *Smith*, *son assault demesne*, and issue being joined thereupon, *Holt* chief *Salk.* 642. justice directed a verdict for the defendant, the first assault being *6 Mod.* 230. tilting the form upon which the defendant sat, whereby he fell; *Holt* 699. the maim was, that the defendant bit off the plaintiff's finger. *11 Mod.* 43.

Zouch *vers.* Thompson.

ACTION of deceit was brought by the plaintiff *Zouch*, as lord *S. C.* 3 *Salk.* of an ancient demesne manor, upon a fine levied of land held *35.* of him as of the said manor; in which he shews, that the manor *Lutw.* 713. of *Odiam* is ancient demesne, and that the lands whereof the fine *S. C. Salk.* was levied, were at the time of levying of the fine held of the *210.* said manor, and impleadable in the court of the lord of the said *3 Lev.* 419. manor, according to the custom of the said manor; that the *Deceit to an-* plaintiff at the time of the levying of the fine was, and yet is, *nul a fine of* lord of the said manor; that the conusor and conusee of the said *lands in anci-* fine are both dead; and therefore he prays, that the fine may be *ent demesne.* annulled, and he restored, &c. Upon which a *venire facias* issued against the heir of the conusee and the terretenant. The terretenant says nothing. But the heir of the conusee comes in, and confesses, that the fine was as aforesaid levied; but he farther saith, that 20 *Car.* 2. a lease was made of these lands (of which the fine was afterwards levied) to *J. S.* redeemable upon payment of 1000/.

Z z

that

that in the lease there was a covenant to levy a fine; that this lease came to his ancestor by several mean assignments; and that the fine was afterwards levied to corroborate the mortgage; and therefore he prayed, that he claiming as a purchaser, this fine might stand in corroboration of his security. The plaintiff demurs. And in this term Gould King's serjeant for the defendant argued, that the conusor and conusee being both dead, the lord had suffered his time to elapse; for the deceit died with the persons, and therefore such action cannot be brought after the death of the parties. And all the precedents are of actions of deceit brought in the life of the parties. *Regist.* 18. *Rast. Entr.* 100. *Fitzb. N. B.* 98. b. 8 H. 4. 22. And there is no case where it was brought against an heir; but the heir of the lord of the manor may bring such action, because it is *in exhaeredationem suam*. The same law of the reversioner of a demesne manor expectant upon an estate for life. *Fitzb. N. Br.* 99. If in *praecipe quod reddat* the tenant loses by default, deceit lies not after the death of the summoners. 35 Hen. 6. 46. 6 Edw. 4. 3.

2. If the conusee inserts more lands than the agreement comprehends, he shall be committed to gaol, which cannot be after his death. *Co. Mag. Ch.* 216. The King had a fine for the deceit. And in 8 Hen. 6. 2. *per Rolfe*, it is said, that the lord may have such action after the death of the party, which the other justices denied.

Lies against
the heir.

Fine to the
King.

But it was adjudged by the court, that deceit will well lie in such case against the heir of the conusor or conusee; for it is a real deceit, and does not resemble the personal deceit of *non summons*. And if the law were otherwise, if the parties died the next day after the fine levied, the lord of the manor must be barred of his right of inheritance for ever. But in the case of summoners the writ must of necessity fail, for default of trial, for the trial must be by examination of the summoners. And *per Levinz* serjeant, it is a real action, and therefore no *capiatur* nor fine shall be in it; to which the judges gave no answer.

2. Serjeant Gould argued, that a fine may be avoided for part, and stand good for part; as where a fine is levied of lands gildable and of lands in ancient demesne; and that as well in writ of deceit as in writ of error. *Fitzb. Deceit* 44. *Jones* 374. *Moor* 465. *March* 127. *Co. Entr.* 277. d. reversal as to part and good as to other part. 2 *Jones* 181 7 Hen. 4. 44. 8 Hen. 4. 24. *Bro. Fines de terres* 101. 17 Edw. 3. 31. So in this case, though the fine be reversed as to the lord, yet it may remain good as to the tenant; because if it should be reversed in the whole, the party would lose his mortgage.

But

But it was adjudged by the court, that a fine may be reversed as to part of the land, and remain good as to the residue; but it cannot be reversed *in toto* as to one man, and remain good *in toto* as to another; which must be in this case, if this fine remain good as to the tenant, and be reversed *in toto* as to the lord.

Fine reversed
in part, and
continues
good in part.

3. Gould serjeant said, that the fine was levied 24 Car. 2. then the fine with non-claim will bar the deceit. But *per curiam* the law is contrary; for a fine may establish the right of another, but cannot establish its own defects.

Fine and non-
claim is no
bar of deceit.

4. Gould serjeant for the defendant argued, that it does not appear what interest this pretended lord of the manor had in the manor at the time of the levying of the fine. For it is not enough to say, that he was *dominus*, &c. but he ought to shew what estate he then had, and that it has continued until this time. *Herne's pleder* 98. For no man but the lord himself can reverse this fine, the heir of the conusor cannot. *Co. Mag. Ch.* 216. Therefore the lord, to intitle himself to this action, ought to shew, what estate he then had, and not aver barely (as he has done here) that he was *dominus*, &c. *et adhuc est*. But *per curiam*, it is well enough; for if the lord has determined or aliened his estate, &c. the defendant ought to shew it, and abate his writ. And upon this point it was adjourned to be argued again. And after argument it was adjudged *Mich. 9 Will. 3.* that the fine should be annulled.

Averment.

Easter Term

9 Will. 3. C. B. 1697.

Sir George Treby *Chief Justice.*
 Sir Edward Nevill } *Justices.*
 Sir John Powell }

Welles *vers.* Needham.

3 Keb. 221.
 Foreign attachment given in evidence upon *non assumpsit* pleaded.
 See Skin. 639.

RESOLVED by the whole court, That a foreign attachment may be given in evidence in *indebitatus assumpsit* upon *non assumpsit* pleaded, though heretofore it was usual to plead it specially. And *per Levinz* serjeant, the practice has been accordingly for more than twenty years last past.

Nicholson *vers.* Sedgwick.

3 Salk. 67.
 Action cannot be brought upon a goldsmith's note by the bearer (though it be payable to J. S. or bearer) in the name of the bearer.

2 Sho. 160, 161.
 12 Mod. 231.
 Comyns 57.
 Post. 442.
 2 Freeman 258.

CASE. The plaintiff declares, *quod inter mercatores et alios negotiantes intra hoc regnum* there is, and time whereof, &c. hath been a custom, that if any merchant or other trader make a bill or note in writing, by which he assumes, to pay to any other person, or the bearer of the bill, such a sum of money, that then such person, who makes such note, is bound by it, to pay such sum to such person to whom the note is made payable, or to the bearer thereof; then the plaintiff shews, that the defendant *Sedgwick* being a goldsmith, made a note in writing, by which he promised to pay to one *Mason*, or to the bearer thereof 100*l.* that *Mason* delivered the note to the plaintiff for 100*l.* in value received; and that for non-payment of this 100*l.* by the defendant to the plaintiff upon demand the plaintiff brought this action against the defendant. *Non assumpsit* pleaded, and verdict for the plaintiff. And it was moved in arrest of judgment by serjeant *Wright*, that this action could not be brought in the name of the bearer, but it ought to be brought in the name of him to whom it was made payable.

payable. *Quod fuit concessum per curiam*; for the difference is, where the note is made payable to the party or bearer, and where it is payable to the party or order; in the latter case the indorsee has been allowed to bring the action in his own name; for there can be no great inconvenience, because the indorsement of the party must appear upon the back of the note, or some other thing sufficiently intimating his assent; but where it is payable to the party or bearer, if the bearer be allowed to bring the action in his own name, it may be very inconvenient; for then any one, who finds the note by accident, may bring the action. And though this last has been frequently attempted, it has never yet prevailed. And therefore in a case in this court between *Horton* and *Coggs* the goldsmith, this difference was taken and agreed; and the judgment there (being the same case with this principal case) was arrested. But the court said that the bearer might bring the action in the name of him to whom the note was made payable. And judgment was arrested, *nisi*, &c. And the same point was resolved in *B. R.* between *Hodges* and *Steward*, *Hil. 4 & 5 Will. & Mar.* But there it was resolved, that the indorsement to the bearer binds the party who immediately indorses it to him. The principal point was also resolved *Mich. 6 Will. & Mar. B. R.* between *Sir Thomas Escourt* and *Cudworth*.

But if it be payable to order, the indorsee may bring an action.

Horton v. Coggs,
3 Lev. 299.

Hodges v. Steward,
1 Salk. 125.
The indorsement binds the indorser.
Escourt v. Cudworth.

Littlewood *vers.* Smith.

False judgment was brought upon a judgment given in the court baron of the honour of *Pomfret* in *Yorkshire*. And serjeant *Lutwyche* moved for reversal of the judgment. 1. Exception. That this action was an action upon the case for words, and upon issue joined the jury assessed 39s. 11d. damages, &c. and the court gave 3l. costs *de incremento*, which he said was ill by 21 *Ja. 1. cap. 16.* which enacts, that if in case for words the jury give less than 40s. damages, the plaintiff shall have no more costs than damages. And he said that this statute extends to these inferior courts, for the words of the act are [any the courts of record at *Westminster*, or any court whatsoever] which words are so general, that they comprehend all courts. But the court inclined strongly, that this inferior court was not within the intent of the act; for if it were, this act would totally take away their power of giving costs *de incremento* in such cases to more than 40s. for the jury there can in no cases give damages beyond 39s. 11d. (for if they did so, the court would have no jurisdiction in the cause) and consequently the court in no such case could give costs *de incremento* above 40s. which was never the intent of the act. But this act ought to be intended of courts, in which the jury may, if they

21 *Ja. 1. c. 16.* which prohibits more costs than damages in case for words, if the jury give under 40s. damages, does not extend to courts baron.

See 1 Salk. 206. & 7 Mod. 129. & 8 Mod. 371, 372.

A a a

please,

please, give more than 40*s.* damages; but in courts baron they cannot. And by *Wright* serjeant (who was not concerned in the cause as council) costs *de incremento*, according as the case requires, are given in all courts baron in *England*, notwithstanding the act of *James 1.*

Want of the time in a declaration.

2. Exc. That no time is laid in the plaint, when these words were spoken, and therefore they might be spoken after the plaint entred. But *per curiam*, that shall never be intended after a verdict, but the contrary.

Joinder of issue.

3. The third exception was to the joining of the issue, for the plaintiff comes and says, *quoad quod* the defendant has tendred an issue, *praedictus* the plaintiff *similiter*, which is nonsense, and no issue joined. Of which opinion was the whole court, who said, that it would be of ill consequence to approve such a precedent. And therefore for this reason judgment was reversed.

Sale of timber growing upon land may be by parol.

T *Reby* chief justice reported to the other justices, that it was a question before him at a trial at *nisi prius* at *Guildhall*, whether the sale of timber growing upon the land ought to be in writing by the statute of frauds, or might be by *parol*? And he was of opinion, and gave the rule accordingly, that it might be by *parol*, because it is but a bare chattel. And to this opinion *Powell* justice agreed. *But quare, for whilst growing timber is part of the inheritance.*

But no mention is made of the opinion of the other judges to whom the case was reported.

Villars *vers.* Parry and Moor.

Comb. 397.
Amendment.
See *Gillb. Hist.*
C. B. 142.
1 *Salk.* 150.
Post. 695,
895.
Comyns 117.
2 *Salk.* 676.
Gillb. Eq.
Rep. 16.
11 *Mod.* 210.
1 *Barnes* 11.

T HE defendants were bail for *Clerk* in a suit brought by the plaintiff's testator, and were bound in recognizance jointly and severally for 2000*l.* Judgment was given against *Clerk*, who brought error in *B. R.* and the judgment was affirmed. Upon which the plaintiff's testator sued a *scire facias* upon the recognizance against the bail *Parry* and *Moor*, who pleaded that no *capias ad satisfaciendum* issued against *Clerk*. The plaintiff replied, that there was a *capias ad satisfaciendum* sued and returned, &c. and therefore prayed judgment to have execution of the several sums mentioned in the recognizance against the defendants. The defendants demurred. And judgment was given for the plaintiff, and entred, that the plaintiff should have execution *de praedictis separalibus summis* 2000*l.* et 2000*l.* against the defendants jointly, whereas the *scire facias* was several. And *Birch* serjeant moved, that this might be amended, because the *scire facias* is right, and that ought to govern all the proceedings. But *Levinz* serjeant *contra*

contra argued, that the judgment ought to have been, that the plaintiff should recover against the defendant *Parry* 2000 *l.* and against the defendant *Moor* 2000 *l.* But as the judgment is entred for 2000 *l.* and 2000 *l.* each of them is charged with 4000 *l.* which is erroneous, but not amendable, because it is an error in law. For if a record be right, and an ill judgment in substance is given, it is not amendable. Therefore if debt is brought against an executor, and judgment given against him *de bonis propriis*, this is not amendable. The same law if a *capiatur* is entred instead of a *misericordia*, because it is error in the judgment of the court in the law; which cases the court agreed. And *Treby* chief justice said, that if this had been upon a joint *lien*, the judgment must have been joint; but here the plaintiff by his several *scire facias* has made it a several *lien*, and therefore the judgment ought to be several. So it is plain error in law, and not amendable. But if it had been *John* for *Thomas*, this had been only *vitium clerici*, and amendable. Or if this motion had been made the same term in which the judgment was given, it might have been amended; because the judgment in the eye of the law is, all the term in which it is pronounced, in the breast of the court. But as the case is, all the justices agreed that it was not amendable. *Mich. 10 Will. 3. B. R.* the writ of error was quashed, and afterwards a new writ of error was brought upon the said judgment. *Post. 547.*

Judgment
against an
executor *de*
bonis propriis,
where it ought
not to be so,
is not amend-
able.

John for
Thomas,
amendable.

Errington *vers.* Thompson.

DEBT upon bond in *London*. The defendant pleads a release dated at *Newcastle* upon *Tine*. The plaintiff demurs. And *Girdler* serjeant for the plaintiff argued, that this is a transitory action, and therefore the plaintiff might lay it where he pleased. Then the release, which the defendant pleads, is also transitory; and when the defendant pleads transitory matter in bar, he ought to conform to the plaintiff's declaration. *Co. Li. 282. 1 Saund. 85. 6 Co. 47.* Therefore *Mich. 5 Will. & Mar. C. B. rot. 797. Bare v. Case*, Debt was brought upon a bond in *London*; the defendant pleaded, that the contract was usurious, made in *Surrey*; the plaintiff demurred generally; and adjudged, that although the plea in bar contained criminal matter, yet because it was transitory, it was ill pleaded, and the plaintiff for that cause had judgment. So in a case between *Pyke* and *Pullen* the same term, in covenant upon a lease for life of land in *London*, the defendant pleaded a release at *Northampton*, and adjudged ill; for it ought to have been pleaded at *London*, where the plaintiff brought his action. And it is no objection, to say that this release in the

Debt upon
bond. The
defendant
pleads a re-
lease made
at *Newcastle*.
2 Lev. 164.
Freem. 437.
438.
Cro. El. 867.
195.
Bare v. Case.
Jenk. 241.
Ro. Abr. 598.
Post. 1043.

Pyke v.
Pullen,
Lutw. 343.

prin-

Datum signifies deliberatum.

Deed bearing date at Bourdeaux in France.

See Cases in parl. 30.

principal case bore date at *Newcastle*; for though it bears date there, it may have been delivered at *London*, and *traditio facit chartam*. And so it is held in *Dier* lately printed 167. b. in *margin*. The court agreed the cases put by serjeant *Girdler*, because the deeds there did not bear date at any particular place; and then they are altogether transitory, and must pursue the declaration of the plaintiff. But where a deed bears date at a certain place, it is local, and must be pleaded there. So *Co. Li.* 6. a. says, that it is disadvantageous to the grantee, to have the deed bear date at any place certain, which is for the reason aforesaid. And in the principal case if the plaintiff had replied *non est factum*, the venue must have come from *Newcastle*. And as to the supposition, that it might be dated at another place and delivered at *London*, the court answered, that *datum prima facie* signifies *deliberatum*. And *Powell* justice said, that if a deed bears date at *Bourdeaux* in *France*, one may declare upon it, for necessity, to be made *in quodam loco vocato Bourdeaux in France in Islington in Middlesex*; but if it be pleaded in bar of an action, it ought to be conformable to the plaintiff's action, because the place where it bears date is not in *England*. But if it be dated at *Bourdeaux* in *partibus transmarinis*, one cannot declare upon it here. But *Treby* chief justice said, that the old opinion in the old books was, that if a bond bears date at *A. in regno Galliae*, it is not triable in *England*; but the new and better opinion is, that in such case it may be laid in pleading to be made where the action is brought. But where a deed is dated at one place in *England*, it cannot be pleaded to be at another. Therefore the court advised the plaintiff to waive his demurrer, and take issue upon the plea; to which it was consented.

Shaw *vers.* Simpson.

Bailiff of a liberty concluded by the sheriff's return.

IN case against a bailiff for the false return of *nulla bona* upon a *fieri facias*, the question was upon the evidence at the trial, whether the bailiff of a liberty shall be concluded in point of evidence by the return of the sheriff? And *per curiam*, he is concluded. And if the sheriff makes any other return than that which the bailiff makes to him, he may have his action against the sheriff. And it was said, that *Holt* chief justice was of this opinion. See 36 *Hen.* 6. 40.

Baker

Baker vers. Wall.

Intr. Trin. 8 Will. 3. C. B. Rot. 1484.

Ejectment for a house and land called *Dumsey* in upon s. C. Prec. in
the demise of *Jane Wall*. Upon not guilty pleaded the jury Chanc 468,
find a special verdict; that *Daniel Wall senior* was seised of the 447, 464,
lands in question in fee, and had issue two sons *Daniel* and *John*, 465.
and made his will in writing in this manner: "Item, I devise to Devise.
" *Daniel* my eldest son all that my farm called *Dumsey* to him
" and his heirs males for ever, if a female, my next heir shall
" allow and pay to her 200*l.* in money or 12*l.* a year out of the
" rents and profits of *Dumsey*, and shall have all the rest to him-
" self, I mean my next heir, to him and his heirs males for ever:"
the jury find farther, that the devisor died, that *Daniel* the son
entred, and died leaving issue but one daughter, the lessor of the
plaintiff; that the younger son *John* entred into the land in
question; that *Jane Wall* entred upon him, and leased to the
plaintiff, who entred; that *John Wall* re-entred, and ejected him,
upon which the plaintiff brought this ejectment; *et si, &c.* And
it was argued at several days by serjeant *Levinz* and serjeant *Wright*
for the plaintiff, that the jury have found the lessor the heir at Heir shall not
law of the devisor; then there must be either express words, or be disinherited
the manifest intent of the party, consistent with the rules of law, by implica-
apparent, to disinherit her; for it is a rule, that an heir shall never tion.
be disinherited by implication. As to the first, there are no ex-
press words here, at least not sufficient; for as to the words [if a
female then my next heir, &c.] now 1. Next heir by itself with-
out addition of male or female is not a good name of purchase.
But 2. admitting that it might be a good name of purchase, yet
here the defendant is not next heir; for the plaintiff's lessor is next
heir to the devisor: And one cannot make a man a purchaser by
the name heir, unless he be actually heir, as *Hobart* says in *Counden*
and *Clerk's* case. And though it may be objected, that the defen-
dant was designed by the devisor, to be special heir; and that *Hale*
chief justice was of opinion, that one may make a special heir a
purchaser by the name of heir; yet that is but a new opinion, and
not warranted by law. And as to the case that he cites, 1 *Ventr.*
381. where a man taking notice, that his brother (who was dead)
had a son, and that he himself had three daughters, who were his
heirs, he gave to them 2000*l.* and to his brother's son he gave
his land, by the name of his heir male, provided that if his
daughters disturbed his heir, that then the devise to them of the
2000*l.* should be void; and it was resolved, that the devisor ta-
king

B b b

king notice that others were his heirs, the limitation to the son of his brother by the name of heir male was by a good name of purchase: as to that case they said, that the devisor expressly took notice, that his three daughters were his heirs, and therefore it was altogether his design to exclude them. But in this case the devisor did not take such notice of the lessor of the plaintiff, nor could he, because she was not then in being. But in the case in *Ventris* the daughters were *in esse* at the time of the devise. Besides, they argued that no intent appeared here to exclude the daughters, because the words (said they) are senseless, and such as out of them no manifest signification can be collected. And for this reason the clause shall be void, and the lessor of the plaintiff shall take as heir by descent.

Devise to *A.*
and his heirs
males for
ever, is an
estate-tail in
A.

Next heir is
not a good
name of pur-
chase without
adding male
or female.

But it was adjudged *per curiam*, upon great consideration, that the defendant ought to have judgment. For 1. they said, that it was very manifest, that the devise to *Daniel* the son was an estate-tail male. For though in a deed it had been fee, yet in a will, to gratify the intent of the devisor, the law will supply the words [of his body.] 2. It is apparent, that the devisor had a design, that if *Daniel* had a daughter, she should not have the lands. For the words [if a female then my next heir, &c.] must be intended as if he had said; but if my son *Daniel* shall have only issue a female, then that person, who would be my next heir, if such issue female of *Daniel* was out of the way, shall have the land. And farther to make his intent more manifest, he gives a rent to such female out of the lands, which demonstrates, that he had no design, that she should have the land; for she could not have both the land and a rent issuing out of the land. Then the rule of law is, that where the intent of the devisor is apparent, if it does not contradict the rules of law, it ought to be pursued. Then it ought to be considered here, how far the intent of the devisor will consist with the rules of law. If the devisor had said no more than, my next heir shall then have the land, that had not been a good name of purchase; because it does not import either male or female specially, but signifies the heir general. But if he had said, next heir male, that had been a special heir, and good. 1 *Coke*, *Archer's* case. Then here, when the devisor says, I mean my next heir to him, &c. by the words [to him] which are of the masculine gender, it is apparent, that he intended male; and these words [to him] are tantamount to the word male; so that it is the same thing, as if he had said, I mean my next heir male, which as before is said, is a good name of purchase as special heir. Then it is clear, that the devisor intended, that such heir male should be a purchaser, because he goes on, and limits it, and to his heirs males for ever; so that it is like 1 *Co.* 66. *b.* *Archer's* case.

case. And as to the objection, that *John* is male, but not heir, for *Jane* the lessor of the plaintiff is right heir to the devisor; and *Hobart* says, that no man can take as purchaser by the name of heir, but he who is right heir; the court answered, that this is generally true, where the devise is to the right heirs of *J. S. &c.* 2 Vent. 311. without saying more; but if the party takes notice, that he has a right heir, and specially excludes him, and then devises it to another by the name of heir; this shall be a special heir to take, as Special heir. *1 Ventr. 381.* the case put by *Hale* chief justice. So in this case the devisor, after having excluded all females who should be his right heirs, gives it to his then next heir male, &c. which is a good special heir. And *Treby* chief justice said, that the insertion of one word, *viz. if*, in the first clause of the will, would put it beyond dispute. As if it should be read, I give to my eldest son *Daniel* and his heirs *if* male for ever, *if* female, then, &c. This will make it a very clear case, and make his intention very clear also, which is a thing very considerable in the case of wills. And therefore in a case lately referred by the lord chancellor to *Holt* Hodgkinson v. Star in cancellaria. chief justice and himself, between *Hodgkinson* and *Star*, *A.* seised of lands in fee had issue two sons *B.* and *C.* and made his will, and devised several lands to *B.* and that *B.* should renounce all his right in *Blackacre* (of which the devisor was then seised) to *C.* That A. should renounce all his right to B. and it was objected, that this was no devise of the land to *C.* 2. That if *B.* should release his right, this was intended to be only an estate for life; but because the words were [all his right] it was apparent, that *A.* intended, that *C.* should have fee; and accordingly they certified their opinions to the lord chancellor. He also cited another case lately adjudged in *C. B.* where *J. S.* having a remainder in fee devised all his remainder to *J. N.* and adjudged, that a fee was devised. Therefore in the principal case the intent of the devisor being apparent, and not contrary to the rules of law, it ought to be fulfilled. And therefore, *per totam curiam*, judgment was given for the defendant. A man devises all his remainder to J. S. J. S. has fee.

Shapcott *vers.* Mugford.

Intr. *Trin.* 8 Will. 3. C. B. Rot. 1091. Cook.

CASE. The plaintiff declares, that he was possessed of divers closes in *B.* which he sowed with corn, and when it was ripe, he reaped it, and made it into sheaves, and duly severed the tithes thereof from the other nine parts; that the defendant was proprietor of the tithes; that the plaintiff required the defendant to take away the tithes off his land, but that the defendant did not take them away in convenient time, but suffered them to Case against a parson, for not carrying away corn being severed from the nine parts, lies, but not trespass vi et armis.

continue

2 Vent. 48.
Hob. 107.
God. Rep.
376, 450.
Noy 19.
Degge 275.
1 Ro. Abr.
643.

Thornton v.
Austen.

Case lies not
for digging
turves in his
soil.

Palm. 341,
381.
Noy 31.
Latch 8.

Trespass *vi et
armis* lies not
for a non fea-
sance.

Hills v. Clerk.

continue there upon the land from the fourth of June 6 Will. 3. until the suing of this action; *per quod per totum tempus praedictum* the grass did not grow where the corn lay, and the plaintiff lost the benefit of the residue of the grass in that close, because he could not depasture his cattle, for fear of doing damage to the corn. Not guilty pleaded. Verdict for the plaintiff and intire damages given. Serjeant Gould moved in arrest of judgment, that the action will not lie, because the plaintiff might have prevented any injury which this corn could do him. For as soon as the tithes are duly severed, the property of them is vested in the parson; then if upon notice he does not carry them away, they may be distrained as damage feasant, or trespass will lie against him. As where an executor does not remove the goods of the testator in convenient time after his death, the owner of the house, where they are, may have trespass against him. 2 Cro. 204. *Stodden v. Harvey*. Then when the law has prescribed a remedy, the party must be content with it, and shall not have any other. And therefore in this court in a case between *Thornton* and *Austen*, *intr. Hil. 4 & 5 Will. & Mar. C. B. Rot. 1051.* the plaintiff brought case against the defendant, and declared, that he was possessed of a close, and the defendant dug pits in it, &c. *per quod*, &c. and after verdict for the plaintiff it was adjudged, that the action will not lie; because the cause of action was properly trespass, for which the party might have an action of trespass, but could not turn it into an action upon the case. But the court answered, that doubtless in the principal case the action would lie, and so they said it had often been adjudged. See 1 *Roll. Ab.* 109. pl. 36, 37. And though it should be admitted, that the plaintiff might have had trespass against the defendant for not taking away the corn in convenient time, yet this was no argument, because in many cases the law allows a double remedy. But they held, as this case was, the plaintiff could not have trespass, but only case. For he could not have trespass *quare vi et armis* he did not take away his corn, which is but a non feasance. But they agreed, that the case of *Thornton v. Austen* was good law, for the plaintiff turned that, which was properly trespass, into an action upon the case, only with design to evade the statute of 22 & 23 Car. 2. and to get full costs, though the damages were under 40s. And that judgment of the case of *Thornton* and *Austen* the judges of the King's Bench approved. [Note for this same reason this term between *Hills* and *Clerk* the plaintiff brought case against the defendant *quare amputavit et spoliavit* his corn, by which he lost it; after verdict for the plaintiff upon the general issue pleaded judgment was arrested.]

Then *Gould* took another exception, that the plaintiff has laid two several damages in his *per quod*, and intire damages are given; then if the action does not lie for the one part, the whole shall be arrested; but (by him) the action does not lie for the loss of the benefit of the grass because he could not depasture his cattle, &c. for he might have put in his cattle without danger; for if the defendant did not take away his tithes in convenient time after notice, the plaintiff might put in his cattle; and though they eat the corn, yet it would be *damnum absque injuria*. Then to suffer the plaintiff to bring an action upon a supposal that he could not put in his cattle when he might; is to suffer him to maintain an action for his own negligence, which the law will not permit. Against this *Birch* serjeant for the plaintiff answered, that the plaintiff could not have put in his cattle; no more than if lessee for years at the end of his term leave corn upon the land, the lessor might put in his cattle to eat it, which he cannot justify. For where a right is once vested in a party, he who destroys it shall be a trespassor. And he cited *Mich. 22 Car. 2. B. R. Rot. 249. Lutscomb vers. Porter*, the case *in terminis* with the present case; and after verdict, judgment there was given for the plaintiff. And it was adjudged *per curiam* in this principal case, that the plaintiff could not put in his cattle, and eat the corn; for if that should be allowed it would subvert the foundation of this action for the other part, which hath often been adjudged maintainable. Besides that it is unreasonable, that the plaintiff himself should be judge, what is convenient time. And to permit him, if the corn is not removed at the day, to put in his cattle, and eat all the corn, would be a much greater loss to the parson, than that which the plaintiff hath sustained by the continuance of the corn upon the land. But it is much more reasonable to permit the plaintiff to bring an action against the parson, and so the court to be judge of the reasonableness of the time, and that the recompense be proportionable to the loss sustained. And therefore judgment was given for the plaintiff.

Lutscomb v. Porter.
Parishioner cannot put in his cattle, and eat the corn tithes, if the parson does not carry them away in convenient time.
Comyns 22.

Hamond *vers.* Lord Jermyn.

CASE against the defendant for a false return, be being bailiff of the liberty of St. Edmundsbury. And the plaintiff declared, that he recovered judgment in C. B. against J. S. for so much, upon which he sued a *fieri facias* directed to the sheriff of Suffolk, which was delivered to him, *qui virtute ejusdem brevis, et pro executione inde, mandavit* to the defendant *adtunc capitali seneschallo libertatis de Bury, qui virtute ejusdem brevis* levied 20*l.* and made a false return, &c. Not guilty pleaded, and verdict for the plaintiff.

In declaration in case for false return the plaintiff shews a mandate, but does not say, what to do, and yet good after verdict.

plaintiff. And serjeant *Lutwyche* moved in arrest of judgment, that here was no mandate to the bailiff, for it is said, that the sheriff commanded him, but it is not said what to do. But the words *fieri faceret* should have been inserted, for want of which the declaration was ill. For the mandate of the sheriff in effect is the foundation of this action. For if there was no good mandate the defendant was not bound to execute the writ, and then all the proceedings afterwards will not prejudice him. Upon which at another day serjeant *Levinz* moved that the plaintiff might amend; for he said, that this was but *vitium clerici*, and therefore amendable by the statute of 8 Hen. 6. He therefore prayed, That upon attendance with the warrant the record might be amended by it. But it was denied by the whole court, for this is the substantial part of the declaration. And it has never been seen, that where attorney has mistaken a deed in pleading, or the debt of a release, that this has been amended by the deed. No more can an amendment be granted in this case. But at another day serjeant *Levinz* moved that this declaration was good without amendment. For when it said, that *virtute ejus brevis et pro executione inde mandavit, &c.* it is a sufficient command to levy the debt, for it is a command to execute the writ which commands to levy the debt. And *Raft. Entr. 275.* is in point as the principal case is. And in cases of return it is always said, *mandavi ballivo, qui nullum dedit responsum*; without saying what to do. And he said, that this exception was moved at a trial before *Holt* chief justice and he overruled it. And in fact, said he, the sheriffs make no warrants to the bailiffs of liberties, but they only send the writ to them; and they execute it upon some general warrant, which they have from the sheriffs, to execute all writs according to the agreement between the sheriffs and bailiffs. But (*per curiam*) this general warrant serves for a warrant to every particular case, for there must be a warrant in writing, because a command by *parol* to the bailiff of a liberty is not sufficient. And the difference is between a return and pleading; for in case of a return it is generally, *mandavi ballivo*, but in pleadings it must be shewn at large. But in this case the whole court held, that the *pro executione inde* was a sufficient mandate, especially after a verdict, and therefore judgment was given for the plaintiff.

Amendment.

Sheriffs do not make warrants to bailiffs of liberties for every writ, but make a general warrant to execute all writs.

Command by parol to the bailiff of a liberty is not good.
Dalton Off. Sheriffs 171, 181, 182.

Yabsley *vers.* Doble.

Confession of an escape by the under-sheriff is evidence against the sheriff.

THE question was, if the confession of an under-sheriff of an escape be any evidence against the high-sheriff; and adjudged that it is. For though the sheriff is suable, yet the under-sheriff gives him a bond to save him harmless, and therefore it will all fall upon him. And therefore his confession is good evidence, because in effect it charges himself.

Copleston

Copleston *vers.* Piper.

Intr. Hil. 7 Will. 3. C. B. Rot. 1231. Windford.

TRespafs *quare clausum necnon mesuagium et tenementum fregit* Uncertainty. *et quandam parcellam bordei asportavit, &c.* Upon not guilty pleaded, verdict for the plaintiff, and intire damages given. And last Easter term Gould King's serjeant moved in arrest of judgment, 1. That the word *tenementum* is too general and uncertain, for it signifies any thing that can be holden. But the *Powells* justices said, that ejectment *de uno tenemento* is ill for the uncertainty, because in that action the thing itself must be recovered, and *tenementum* may signify a thing for which ejectment will not lie, as an advowson, &c. but in trespass, where damages only are recoverable, the word will serve well enough. But in this case, it being after verdict, they will intend that it signifies the same with *mesuagium*, and so surplusage, and no damages given for it. To which *Treby* chief justice agreed. 2. *Gould* argued, that the declaration was too uncertain, for the jury could not know, for what quantity of barley the plaintiff declared, for the word parcel is very uncertain. And therefore 3 Cro. 865. *b. trover for parcella piscium Anglice* ling, judgment was arrested for the uncertainty. 5 Co. 34. *Playter's* case. Besides that, it does not appear, whether this parcel was severed from the ground, or growing upon it; in which cases the defendant must have different pleas, for in the first case he might justify by distress, in the last he must make title to the land. And therefore the plaintiff ought to have declared for so many loads of barley, &c. But as to this the court said, that after verdict they will intend, that it was severed from the land. But as to the other exception they said, that this differs from *Playter's* case; for in that case there was neither quantity nor quality, but here there is quality. And *Treby* chief justice said, that in the term before, trespass *pro tribus struibus foeni, Anglice* ricks of hay, was adjudged good after verdict. And *Powell junior* justice said, that *trover pro una parcella fli* had been adjudged good in the King's Bench; and yet there it seems that there was uncertainty in the quantity and quality also, for there are several sorts of thread. See 1 Mod. 295. 1 Ventr. 105. So that they seemed to be of opinion that the principal case was well enough; but upon the importunity of the defendant's counsel it was stayed till the plaintiff should move for his judgment. And now this term *Darnall* serjeant moved for judgment; and said that it was good, after verdict at least. And he cited *Stile* 199, 75, 224, 353. 2 Cro. 665. Pasch. 1694. *B. R. Etherick v. Calendar. Trover de tribus peciis vini* Etherick v. Calendar.

Tellus pectis vini branditati, Anglice brandy wine; the defendant demurred generally; and exception there was taken, that *pectis* was a very uncertain word; but it was adjudged well enough after verdict. And in that case *Holt* cited a case between *Brassey* and *Roe*, *trouver pro quatuor pectis tracti grasetti*, Anglice drawn grasett, which was adjudged good upon demurrer. But *Treby* chief justice said, that a piece of stuff was a quantity known to consist of so many yards; but a parcel of barley is no quantity known. And therefore last Michaelmas term in a case between *Smith* and *Theobald*, *trouver de quodam parcella culmi*, after verdict judgment was arrested, nisi, &c. And in *Trin. 22 Car. 2. B. R. Rot. 373. trover de quodam parcella fili*, it was adjudged ill after verdict. And therefore he thought, that judgment ought to be arrested, and it was arrested, nisi, &c.

Reynoldson *vers.* Blake and the bishop of London.

S. C. 3 Lev. 435.
Lev. Entr. 141.
Ro. Abr. 376.
Bro. Qua. Imp. p. 138.
Watf. Compl. Incumb. 8vo. 444. c. 22.
2 And. 50.
pl. 37.
3 Nelf. a. 36.
Goldb. 78.
Cro. El. 119.
1 Salk. 165.

THE plaintiffs brought *quare impedit*, for hindring them to present to the church of St. *Andrew's Wardrobe* in London; and declare that by the great fire of London 2 Sept. 1666. the parish churches of St. *Anne's Blackfriars* and St. *Andrew's Wardrobe* were burnt; that by the act 22 Car. 2. cap. 11. it was enacted, that the parishes of St. *Anne Blackfriars* and St. *Andrew Wardrobe* should be united, and that the parish church of St. *Andrew's Wardrobe* should be rebuilt, and should be the parish church of both parishes; that the several patrons of the respective parish churches should present by turns to this new church; and that the patron of that church, of which the indowments were of the greater annual value, should have the first presentation; then the plaintiffs aver, that that the indowments of the rectory of the church of St. *Andrew's Wardrobe* were of greater annual value than the indowments *praedictae vicariae ecclesiae* of St. *Anne Blackfriars*; then the plaintiffs shew that Sir *Thomas Gouge* was seised in fee of the rectory impropriate, to which the vicarage of St. *Anne Blackfriars* *adtunc pertinebat*, and being so seised of the rectory, and being *verus et indubitatus patronus inde, dedit et concessit* by indenture the said rectory to the plaintiffs and divers others and their heirs, as survivors of whom the plaintiffs bring this *quare impedit*; and shew farther, that *James Cade* incumbent at the time of the fire of the church of St. *Andrew's Wardrobe* died, whereby the church became void; that King *Charles II.* as patron of the church of St. *Andrew's Wardrobe* presented *Stoning*, who was admitted, instituted, and inducted, which was the first turn after the fire; that *Stoning* died 6 Will. & Mar. whereby the church became void; and it pertained to the plaintiffs to present as the second turn, &c. and the defendants

dants disturbed them, *ad damnum*, &c. the bishop pleads his common plea as ordinary; and the defendant *Blake* demurs to the declaration.

This case was argued several times at the bar by *Gould* and *Wright* King's serjeants for the defendants, and by *Pemberton* and *Birch* serjeants for the plaintiffs. And several exceptions were taken to the declaration, to which the court gave no resolution.

1 Exc. That the plaintiffs have declared ill, because they say, that the indowment of the church of *St. Andrew's Wardrobe* was of greater value than the indowment *praedictae vicariae ecclesiae de St. Anne's Blackfriars*. Now if this had been two churches appropriate, this might have been well, because every church is indowed of the tithes, glebe, &c. but all vicarages are not indowed; therefore the plaintiffs should have shewed before, that the vicarage was indowed, which indowment the defendant might have traversed. Averment.
All vicarages are not indowed.

2 Exc. The plaintiffs should have said, that the indowment of the one is of greater value than, *viz.* of such a value. And though it is not obligatory, nor conclusive to the trial, yet for conformity in good pleading it ought to have been shewn. *6 Co. 47. 9 Co. 118. 2 Brownl. 184.* General averment.

3 Exc. The plaintiffs have pleaded a grant by deed of the rectory, to which the vicarage of *St. Anne's Blackfriars* appertained, by Sir *Thomas Gouge*, and have not alleged any consideration; so that the use will be to Sir *Thomas* and his heirs, and executed by the statute, and so no title in the plaintiffs. If a rectory be granted without consideration, the use results, and is executed by the statute.
2 Rep. 32.

4 Exc. The plaintiffs have declared, that Sir *Thomas Gouge* by deed *dedit et concessit* the rectory to which the vicarage appertained. Now a rectory will not pass by grant, because it consists of glebe land, &c. And the general practice is to make livery of seisin, and the books compare it to a manor. *16 Hen. 7. 3. b. 3 Hen. 7. 14. a. 21 Hen. 7. 21. b.* Lease for years of a rectory is good without deed, because it contains glebe land. The same law of a parsonage, *19 Hen. 8. 12.* If the plaintiff had said generally that Sir *Thomas Gouge dedit et concessit*, the court would have intended livery; but not now, because he has said that it was by deed, which destroys the intendment. And so it was adjudged *Pasch. 15 Car. 2. C. B. George v. Burr*; a conveyance of lands was pleaded by *dedit et concessit per chartam feoffamenti*; and it was held ill, because the word *chartam* destroyed the intendment. Livery is requisite to convey a rectory.
Lease for years of a rectory or parsonage good by parol.
George v. Burr.
Intendment of livery destroyed.

of livery, which the court would have had, if it had been pleaded by *dedit* generally.

But the court took no regard to these objections; and the judges, when they gave judgment, made but three points in their arguments.

1 Point. Whether the plaintiffs have sufficiently averred, that the indowment of the church of *St. Andrew's Wardrobe* was of greater value than the indowment of the church of *St. Anne's Blackfriars*. For the act has appointed, that the patron of the church, whose indowment is of the greater value, should have the first turn; so that the indowment of the churches is the measure by which the turns must be governed. And it was objected by the defendant's council, that the plaintiffs have not made a sufficient averment as to this point; for (said they) the plaintiffs have averred, that the indowment of the church of *St. Andrew's Wardrobe* is of greater value than the indowment *praedictae vicariae ecclesiae de St. Anne's Blackfriars*; whereas they have not made any mention of any vicarage before, to which this relative word *praedictae* can refer; and for this reason the averment is not sufficient; and by this the indowment, which is a substantial part, is not traversable. And *Gould* serjeant for the defendant argued, that the court could not reject this word *praedictae*; for (by him) the difference is, that where the matter appears once well upon the record, and then a *praedict'* or *scilicet* which is repugnant follows, there the court will reject the *praedict'* or *scilicet*, because there appears enough before to be a foundation of a judgment; but where that which follows the *praedict'* or *scilicet* is material, and the point of the action, and not well shewn upon the record before, there it cannot be rejected nor amended. And upon this reason the cases 2 Cro. 149. *Jennings v. Markham*; *Yelv.* 110. 2 Cro. 618. *Hanbury v. Ireland*, are grounded. There is also a difference when the case is after verdict, and when upon demurrer. As *Pasch.* 4 Will. & Mar. C. B. *Benjamin Dennis* brought trespass against *Robert Earl* for breaking his close; and the record was, *Robertus Earl attachiatus fuit ad respondendum Benjamine Dennis quare clausum, &c. fregit, &c.* then comes the declaration and says, *et unde idem Benjaminus queritur quod praedictus Benjaminus, &c.* the defendant justified for a way, &c. and issue thereupon, and verdict for the plaintiff; and upon motion in arrest of judgment, adjudged, that this being after verdict, and it appearing upon the record that the defendant broke the close, it should be amended. But this principal case is upon a demurrer, and the matter does not appear well laid before upon the record, because no church is mentioned before;

Praedict' or
scilicet re-
jected.

Dennis v.
Earl.

before; therefore for this reason the declaration is ill, and the word *praedict* cannot be rejected. But the whole court resolved, that the averment was sufficient, for they would reject the word *praedictae* as surplusage. And *Powell* justice cited *Hardr.* 330. as a case of the same nature.

2. The second point was, whether by this union the appendancy of the vicarage of *St. Anne's Blackfriars* to the rectory was destroyed; for if it were, it would be fatal to the plaintiffs, because there were not sufficient words in the grant of *Sir Thomas Gouge* to convey an advowson in gross to the plaintiffs, and consequently the plaintiffs had no title.

3. The third point was, whether the declaration was good, notwithstanding that the plaintiffs had not shewn any presentation to the church of *St. Anne Blackfriars*? And as to the second point, *Powell* justice was of opinion, that the appendancy was not destroyed, but that the right of presentation every second turn to the new church became appendant to the rectory, as the vicarage was before. For the better clearing of which opinion he said, that he would consider, 1. What an union was at common law. And (by him) at common law, the parson, patron, and ordinary, might make union of two weak churches, without the consent of the King. 5 *Ed.* 3. 26. if they were very poor, because the King's concern was very small; but if they were of reasonable value, then the King's consent must concur; because an advowson was a thing which lay in tenure, and might be held *in capite*, and therefore the King might be prejudiced in his ward; and secondly, he might be barred of a casual profit, as a lapse, which in probability might happen sooner where there were two churches, than where there was but one; but yet the ordinary was the chief actor, and therefore if the consent of the King was subsequent, it was sufficient.

Union was made *concurrentibus his quae in hac parte de jure requirebantur*; and exception was taken, that it was not said by whom the union was made; but it was answered, that this was the act of a spiritual judge, and the common law would not examine it, no more than sentences of the spiritual court. 11 *Hen.* 7. 8. 26. And at that time the law was very uncertain what churches were poor enough, which gave occasion to the making of the act 37 *Hen.* 8. cap. 21. the making of which act gave jurisdiction to the common law, to examine if unions were well made. As marriages, though they were originally *alterius fori*, yet when the act of parliament meddled with them, it gave jurisdiction to the temporal judge; and therefore 2 *Roll. Ab.* 778. *Mordant vers. Dobson*, the common law took so far notice of unions after the act, that the judges

Parson, patron, and ordinary, might make an union.

Union of spiritual consanguinity until 37 *Hen.* 8. cap. 21.

judges granted a prohibition to the spiritual court, for suing the parishioners to come to a church upon a union, where the union was void. And it was a question, whether this act did not exclude all unions at common law? But it was held by three judges against *Popham*, that it did not. 3 *Cro.* 500. *Moor* 408. *pl.* 599 & 661, *pl.* 904. 2 *Roll. Abr.* 778. *A.* 1. *Austen v. Twine.*

2. He said, that he would consider the operation of such a union.

Operation of
the union.

And as to that he said, that it was generally made in time of vacancy of the church; for if the church was full, the act of the ordinary could not prejudice the incumbent, for by the union the incumbency would be destroyed; therefore if the church was full, the consent of the incumbent was necessary. But if the church was full, and the incumbent would not consent, the union could not be made *de verbis in praesenti*; but it might be made *de verbis in futuro, quando vacaverit, &c.* 6 *H.* 7. 14. And after the union the ordinary might compel the parishioners, to come to the church to which the union was made, and to pay their tithes, by process in his court, and no prohibition was grantable. And this was no prejudice to the parishioners, because their *modus's* continued good; but the parish, as to taxes, duties, rates, reparations of the church, &c. continued distinct. *Hob.* 67. The reparations must be several, for otherwise it might be prejudicial to the parishioners, because the old church might be much less in proportion than the new. But the union made it but one church and one benefice, and it is the benefice to which the union is made. 10 *Co.* 136. Then if there is but one benefice, the other is perfectly extinct. But *Hobart* 158. says, that if a man hath a benefice with cure, of the value of eight pounds *per annum* and more, he cannot without qualification and dispensation procure another with cure to be united to it afterwards, although they make but one benefice. And it seemed to him, that the opinion of *Hobart* was good law. 2. What becomes of the advowson? The advowson, said he, is but the right of presenting an incumbent to the church or benefice; then if there is after the union but one church and one benefice (as is proved before) then there could be but one advowson, and that is of the church to which the union is made.

Plurality.

3. He said, that he would consider the difference between tenants in common and coparceners of advowsons, and patrons of united churches.

2

1. By

1. By tenants in common (he said) he did not mean, where a man seised in fee of an advowson accepts a fine of it, and grants and renders every second turn; but where a man seised in fee of an advowson grants a moiety of it. In such cases the writ of right must be *de medietate advocacionis*. But where one church has two several incumbents, and two several advowsons, and each of them has a distinct moiety of the tithes, there the writ of right must be *de advocacione medietatis ecclesiae*, and the *quare impedit* in this last case *ad medietatem ecclesiae* or *ecclesiam*; but in the case of tenants in common they must all join in *quare impedit* against a stranger; and so if the one usurp upon the other, the other has no remedy; but if they do not join in the presentation, the bishop may refuse to admit the presentee.

2. In case of coparceners of an advowson, their right is several, and therefore because the advowson is but one, the writ of right must be *de medietate advocacionis*; but their possession is partly joint and partly several; for if they all join in a presentation, the bishop is bound to accept their presentee, and if they are disturbed, they shall join in *quare impedit*; but if they do not agree among themselves, the bishop may refuse all their presentees; but if the eldest present alone, the bishop is bound to accept her presentee by particular privilege which she hath, which privilege goes to her assignee, &c. But if they make composition (which may be by *parol*) if a stranger usurp, she against whom the usurpation is made may maintain a *quare impedit* against a stranger, whether the composition be according to common right or otherwise. But their possessions are so joint that they cannot usurp one upon another, no more than tenants in common.

3. Patrons of united churches have also several rights, and therefore the writ of right ought to be *de medietate advocacionis*; and their possessions are also several, so the one may usurp upon the other, and drive him to his *quare impedit*; and each of them, if he be disturbed, shall have his *quare impedit* against a stranger. So that tenants in common have several rights but joint possessions; coparceners several rights but possessions partly joint and partly several; but patrons of united churches have both rights and possessions several. To prove which diversity he cited 33 Hen. 6. 11. 5 Hen. 7. 8. 14 Hen. 6. 15. Co. Li. 186. 3 Cro. 688. Windsor's case, Co. Entr. 489. which last books prove, that though in case of united churches there is but one advowson in right, yet every patron has the whole advowson to his turn; but the writ of right must be according to the right. See Moor 867. Dier 299.

Appendancy,
destroyed.

4. He said he would consider, what would destroy an appendancy. If an advowson by act of the party be once severed from the manor to which it is appendant, though but for an instant, it becomes in gross, and the appendancy is destroyed for ever. And therefore the difference is, if a man seised of a manor to which an advowson is appendant, accepts a fine of the advowson, and grants and renders every second turn, by the alternate turn the appendancy continues. But if he levies a fine of the advowson, and accepts a grant and render, the appendancy is totally destroyed, because there was an instantaneous severance. So if there be two coparceners of a manor, to which an advowson is appendant, and they make partition of the manor, without taking notice of the advowson, the advowson at each turn continues appendant; but if they make express exception of the advowson upon the partition, it becomes in gross. If they make partition of the manor, and the demesnes are allotted to the one, and the services to the other, the manor is destroyed, and the advowson becomes in gross. But if the one dies without issue, so that the demesnes descend to her who has the services, or *vice versa*, the manor is revived, and the advowson becomes appendant again, because it was by act in law. So that the diversity is, where the severance is by act of law, and where by the act of the party. 17 Edw. 3. 38. 12 Hen. 7. 5. 8 Co. 79. *Bro. Quare impedit* 118. Co. Li. 122. The question then will be, if the union be an act in law? And he was of opinion, that it was, because it is made by the spiritual judge, who is the chief actor in it. And though the advowson be destroyed by the union, yet when it is severed in turns, each turn becomes appendant still, because it is done by act in law, which does not alter the nature of the thing. And that union does not destroy the appendancy, he cited *Dier* 259. as an express authority, and *Windsor's* case is an authority in point. For that was a *quare impedit* for a church united as appendant, as appears by 3 Cro. 688. If then at common law union would not destroy the appendancy, much less will an act of parliament do it, which is an act of the highest law, which designs to do no wrong to any, but only to take away the incumbency, and give to each a second turn instead of it, and in the same plight, as he had the advowson before. Therefore he was of opinion in this case, that this act of parliament had not destroyed the appendancy, but that the plaintiffs had good title to present every second turn by the grant of the rectory.

3 Cro. 686.

Union of two
churches, of
which one is
appendant to
the rectory,
destroys the
appendancy.

But *Nevill* justice and *Treby* chief justice against this for the defendants argued, that the appendancy was destroyed by the union, and then nothing passed by the grant of Sir *Thomas Gorge* to the plaintiffs. For the *ad quam*, &c. conveyed nothing, if there was

was no appendancy. And Treby chief justice said, that union was originally the subject of the canon law, concerning which there are many rules which have been received by the common law, and thereby became part of it, for the interpretation of which, regard might be had to the spiritual law, in which they were first used, 3 Cro. 501. And in foreign countries rights of advowson and patronage are determined in spiritual courts, but our common law admits of no such thing. *24. 2 Inst. 273.*

Linwood provinc. 159. constitution. Otbonis 35. says, that by Union, how it operates? union the church which is united is extinct, and of the two benefices the more worthy shall be retained; and all unions ought to be perpetual and unlimited, and by consent of all the parties concerned; but the patrons are more than consenters, for they extinguish an old interest; for the church united is a new thing created, and there is another patron and patronage created than were before; so that this church is not the ancient rectory nor vicarage, but *novum aliquid tertium* composed of both; and he who is made patron by the ordinary (for the patronage may be limited as well to one as to both) may have a *quare impedit*, though he has not had execution by presentment. 50 *Edw. 3. 27. a.* So that it must be a new advowson, which is created; and not the old, which continues. And this new advowson is not appendant, neither in respect of the one nor of the other; but it is like the case of an escheat; where *Blackacre* is held of the manor, and escheats, it is incorporated and become parcel of the manor. So that the vicarage here is extinct and the advowson also (and if the vicarage were not extinct, it would be against the plaintiffs, for then the *quare impedit* ought to be brought for the vicarage) and instead of the vicarage every second turn is given to present to this new church, which is in gross, and cannot be appendant. And it seemed to him, that the patronages of the distinct parishes were annihilated, and a new advowson created, which should go every second turn to the several former patrons, which is a new advowson in gross. And though it might be objected, that there was here the agreement of all parties, that the second turn should come instead of the vicarage, and in the same plight as that was. He confessed, that union was wholly by agreement. *Doctor and stud. 116. b.* and the parties have power to appoint the turns, but not to make an appendancy, for no consent, but time immemorial only, can do that. Appendancy consists wholly in prescription, and passes in grants under the words *cum pertinentiis*. It is true, that in pleading there is no need to lay a prescription, 4 *Co. Tiringham's Case*. But it must be always taken that it was by prescription, *Dier 199.* Then there cannot be here any appendancy, because the beginning of this new church and advowson is well known,

known, and shewn in the declaration. Besides, that it is impossible to make a new church appendant, for that would be in effect, to make that which is done at this day, to be done long ago. As to the case of *Dier* 259. which is the only case, where *quare impedit* is brought upon a united church; the words of the book are [*Et issint semble en l'autre case per l'opinion d'ascuns*] which imply, that others were of a contrary opinion. 2. This point of appendancy is an unnecessary question there, as appears by reading the case.

Objection. *Windsor's case.* 3 Cro. 688.

Answer. That was not a church united, nothing of it appears in any of the other reports of the case, nor in the record itself, but it seems to be an imaginary discourse of *Croke*; but yet there were the words *ad hoc pertinet*, which are wanting in this case; but there was no necessity there, to speak of an union, for he would suppose (which is not at all improbable) that there were two lords of two adjoining manors, who contributed to the building of the church; the one contributed more by one part than the other, and so reserved to himself two turns, and the other lord had the third turn; so that there was no necessity to resort to *Croke's* imagination of a union, to maintain the declaration in *Windsor's case*; but this supposition is much more probable and agreeable to the rules of law, for *patronum faciunt dos, aedificatio, fundus*. Heretofore it was doubted, whether the advowson of the vicarage was appendant to the rectory, 17 *Edw.* 3. 51. and it was long before a vicar obtained the repute of a corporation; but it is now settled, that it may be appendant to the rectory; and *Coke* says, that it may be appendant to a manor.

Advowson of
a vicarage ap-
pendant to a
manor.
1 Roll. Ab.
231. pl. 14.

As to the diversities taken by *Powell* justice between tenants in common, and coparceners of advowsons, and patrons of churches united, he said that the books were clear, and he agreed with them. But composition, he said, might make an advowson appendant to become in gross, but not *e contra*.

If a man brings *quare impedit* for an advowson appendant to a manor, he has no necessity to shew prescription for the appendancy, but may say generally, that he was seised of a manor, to which the advowson is appendant. In the same manner in this case when the plaintiff has once executed his turn by presentment, in *quare impedit* afterwards he has nothing to do, but to shew, and say, that he was seised of every second turn *ut in grosso*, and has no need to derive his title higher. *Vaugh.* 2. 3 Cro. 811. 3 *Leon.* 163. *Cheverton's case*.

Quare impedit
upon union.

Objection

Objection. This would do a wrong, to destroy the appendancy, and convert it into an advowson in gross.

Answer. An advowson in gross is as beneficial as an advowson appendant, and this turn given by the act of parliament comes in head of the vicarage, but cannot be appendant, because it is impossible, since all the world knows that it begun but by the act. And though the union is by act of parliament, it is not material; for when an act concerns a particular estate, it is but a higher sort of conveyance. And then if it makes use of the terms of the common law, the court ought to make such construction as the common law would have made. For which reasons he was of opinion, that the appendancy was wholly destroyed. A statute concerning a particular estate is but a higher way of conveyance.

As to the third point, whether the declaration was good notwithstanding that no presentation was laid to the church of St. Anne Presentation in quare impedit, where necessary? Blackfriars, all the court was of opinion that the declaration for this fault was ill, and therefore that judgment ought to be given for the defendant.

Powell justice said, that a presentation to a church is the only possession. A grant will vest a title in the grantee, but nothing will give possession but a presentation. Then it would be absurd to maintain a possessory action without a possession. Therefore a presentation is always necessary for the maintaining of a *quare impedit*, except in some special cases; as if a man found a church, and before he presents he is disturbed, he shall maintain a *quare impedit* without shewing a presentation, by shewing the special matter. So if a church has been appropriated time whereof, &c. so that none knows who was the last incumbent, if the appropriation be dissolved, so that the church reverts to the heir of the first founder; if he be disturbed he may shew the special matter, and maintain a *quare impedit* without shewing a presentation. The same law if a man be disturbed after recovery in a writ of right of advowson, before he has presented, though heretofore it was a question. So where the King is intitled by office, that *J. S.* The King intitled by office. The King intitled by office. died seised of an advowson, &c. though this does not give the King such possession, as the office gives of lands (for there before a man can controvert the King's title he must traverse the office, but in the case of an advowson if the King brings a *quare impedit* a man may controvert his title before he has traversed the office); yet the King upon such office may maintain a *quare impedit* before presentation. But in this case a presentation should have been shewn, which the defendant might have traversed. And though it was objected, that the act made use of this word patron as *designatio personae*,
F f f

personae, and therefore the averment that Sir Thomas Gouge was *verus et indubitatus patronus* was enough. The court answered, that if the act intended this word patron as *designatio personae*, then it must be an advowson in gross, and consequently the plaintiffs would have no title, by the resolution of the second point. But it appears, that the act did not design it as a designation of the person, but refers it to the former right; and therefore the plaintiffs, to intitle themselves, ought to make Sir Thomas Gouge compleat patron in law, which should be by shewing a presentation. For if there were an usurpation upon Sir Thomas Gouge, and the second turn had happened during the usurpation, the usurper must present, until he is removed. And Powell justice said, that *Rast. Entr.* 522. was a case almost in point, and gave great light to the matter of the union, and that in *quare impedit* a presentation must be shewn before the union, and by reason of which defect alone Powell justice was of opinion, that judgment ought to be given for the defendant. Treby chief justice said, that if the plaintiffs had claimed it as the old vicarage, that then a presentation ought to be shewn as well in this as in all the other cases of *quare impedit* put by Powell justice, for presentment makes a title where there is none, and proves a title where there is one. *Hob.* 192. *Vaugh.* 9, 10. *10 Co.* 33, 34. But as this case is, he doubted more of this than of the second point; for the *quare impedit* is not brought for the vicarage which is destroyed, but for the new church; and therefore this title to the vicarage seems but inducement. But yet he said, that he inclined to believe that the plaintiffs should have laid a presentation, because general pleading is always disallowed, as well in cases upon statutes as at common law. *Hob.* 295. *Jones* 6. 11 *Hen.* 7. 8. 5 *Ed.* 4. 5. *b.* And though it is objected, that the acts says [the patron, &c.] and the plaintiffs have averred, that Sir Thomas Gouge was patron; yet they should have shewn, how he was patron, for the reasons aforesaid given by Powell justice. And though it was objected, that it might be taken, whether he was patron or not; he answered, it was difficult to traverse so general a word as patron, or not; and there was but one precedent of such a general issue, which is 28 *Affis.* 22. But one ought not to rely upon that book, because pleading was not then arrived at any perfection. One cannot take issue upon the word heir, &c. For which reasons he was of opinion, that the declaration was ill in this point also. Judgment was given for the defendant.

General
pleading dis-
allowed.

Obj.

Anf.

Issue, patron
or not, heir or
not.

Note, Powell justice said to Treby chief justice, that Holt chief justice agreed with him as to the second point against the opinion of Treby. In error brought in *B. R.* the judgment was affirmed, but reversed in parliament afterwards, as *Levinz* reports.

Ludding-

Luddington vers. Kime.

Intr. Trin. 5 Will. 3 Mar. C. B. Rot. 1561.

REplevin of cattle taken in *Willoughby*, in a place called *Westfield*, 11 Nov. 3 Will. 3 Mar. The defendant makes confession as bailiff to *Syms*, and shews that *Sir Thomas Barnardiston* was seised in fee of the place where, &c. and being so seised 29 Octob. 3 Will. 3 Mar. demised it to *Syms*, to have and to hold from the 29th of October 3 Will. 3 Mar. until the 25th of March following; and the defendant as bailiff to *Syms* took the cattle in the place where, &c. damage feasant, &c. The plaintiff pleads in bar of the confession, that *Armyn Bellingham* was seised in fee of the place where, &c. and licensed the plaintiff to put in his cattle, &c. and traverses the seisin in fee of *Sir Thomas Barnardiston*. Upon which issue is joined. And the jury find a special verdict, that *Sir Michael Armyn* being seised in fee of the manor of *Willoughby*, whereof the place where, &c. *est et ad tunc fuit parcella*, made his will, by which (after a devise of a rent charge out of the said manor) he devised the said manor to *Evers Armyn* for life without impeachment of waste, and in case that he should have any issue male, then to such issue male and his heirs for ever, and if he should die without issue male, then to *Sir Thomas Barnardiston*, nephew to the devisor and his heirs for ever; the jury find, that *Sir Michael Armyn* died, that *Evers Armyn* entred, and was seised *prout lex postulat*; and being so seised suffered a common recovery to the use of himself and his heirs for ever; and devised this manor to *Armyn Bellingham* and his heirs for ever, and died without having any issue, that *Sir Thomas Barnardiston* entred, and demised to *Syms*; that *Armyn Bellingham* entred upon him, and licensed the plaintiff to put in his cattle, and that he did accordingly; and that the defendants as bailiffs to *Syms* took the cattle damage feasant; *et si*, &c. This case was argued several times by serjeant *Pemberton* for the plaintiff, and serjeant *Birch* for the defendant in Easter term 8 Will. 3. and by serjeant *Wright* for the plaintiff, and serjeant *Levinz* for the defendant in Hilary term 8 Will. 3. And now in this term the judges pronounced their opinions in solemn arguments on the bench.

The first point that was made in this case was, whether the estate devised to *Evers Armyn* was an estate tail, or for life only. If it was an estate tail it would be clear for the plaintiff, for then it would be a common case; *Evers Armyn* tenant in tail, remainder to *Sir Thomas Barnardiston* in fee, *Evers Armyn* may well suffer

suffer a common recovery, and bar all remainders. But the whole court resolved, that *Evers Armyn* had but an estate for life.

Powell justice said, that he would consider, 1. The case as if the devise to the issue male had been omitted, viz. as if the words had been, I devise to *Evers Armyn* for life without impeachment of waste, and if he die without issue, then to *Sir Thomas Barnardiston* in fee. 2. He said, that he would consider all the words collectively as they are in the will.

Tail by implication.

1. As to the first he said, that there were apt words to raise an estate tail by implication, as 2 *Cro.* 415, 448, 655, 695. 9 *Co.* 127. But in all these cases no express estate for life was devised. But where there are words which convey an express estate for life, as in this case, there subsequent words will not create another different estate in the same party by implication; for which he cited *Co. Li.* 319. b. *Dier* 171, 330. 3 *Cro.* 248. *Moor* 593. 2 *Leon.* 226. 3 *Cro.* 6 *Co.* 16, 17. 16. *Moor* 123. 3 *Leon.* 130. 4 *Leon.* 41. 1 *Mod.* 189. 2 *Roll. Re.* 282. 1 *Bulst.* 220. 1 *Leon.* 159. And though my lord chief justice *Hale* in 1 *Vent.* 230. was of a contrary opinion (to whom he bore a great deference) yet he could not concur with him; for the books cited by *Hale*, viz. 1 *Roll. Abr.* 837. *Moor* 682. 2 *Roll.* 253. *Stile* 250. depended upon particular reasons. But 1 *Sid.* 47. *Plunket v. Holmes* is an express authority for this opinion of his own; where a man devises to his son *T.* for life, and after his decease, if he die without issue living at his death, to *L. &c.* it was adjudged that *T.* had an estate for life only. But *Treby* chief justice in his argument said, that if the devise had been to *Evers Armyn* for life, and if he died without issue male, then to *Sir Thomas Barnardiston*, that this had been an express estate tail in *Evers Armyn*; because it could not be supposed, that the devisor intended to make a breach in the estate, viz. that *Evers Armyn* should have it for his life, and when he died it should revert to the heir of the devisor until the issue of *Evers Armyn* were dead, for it could not go to the issue of *Evers Armyn*, admitting that it was not an estate tail in *Evers Armyn*, because there was no devise to the issue of *Evers Armyn*, and *Sir Thomas Barnardiston* could not have it until *Evers Armyn* was dead without issue, and therefore in the interim it must revert to the heir of the devisor, which was apparently against his intention. Besides, that (by him) tenant in tail in many respects is but a bare tenant for life, as to charge, &c. And though the words without impeachment of waste were added, that will not hinder it from being an estate tail. For which he cited *Old Bendl.* 31. pl. 126. as express in point. Note, That is a limitation by fine.

As to the second, *Powell* justice said, considering all the words collectively as they were in the will, that *Evers Armyn* had but an estate for life; and the whole court agreed with him. And they held farther, that the issue male of *Evers Armyn* (if there had been any) would have taken a fee by purchase. For, 1. They held, that though the word issue is sometimes construed as heirs, and a word of limitation, yet in a devise, it may be a word of purchase as well as of limitation. When it is taken as a word of limitation, it is collective, and signifies all the descendants in all generations; but when it is taken as a word of purchase, it may denote a particular person, as 3 *Cro.* 40. *Savil.* 75. 1 *Anderf.* 132. 2 *Leon.* 35. 2 *Bulstr.* 108. prove, that this word issue may be *designatio personae*. And *Treby* chief justice said, that words less apt had been used, and allowed good, for words of purchase. 1 *Co.* 95. b. Feoffment to the use of *A.* for life, and after his death to the use of his heirs, and the heirs females of their bodies; the word *heirs* was allowed for a good name of purchase. So 1 *Co.* *Archer's* case. And yet heir is more naturally appropriated to limitation than to purchase; but because it appeared that the intention of the parties was to use it as *designatio personae*, and a word of purchase, it was allowed good. Much more shall the word *issue* be allowed a good word of purchase, where the party intends that it shall be so, and that intention is apparent. But the chief case upon which they relied, was the case of *Clerk v. Day*, 1 *Roll. Ab.* 839. 3 *Cro.* 313. *Owen* 148. *Moor* 593. the record of which they had seen; and though no judgment is entred upon the roll, yet *Moor* (who reports the case as depending more than a year after the time of which the other reporters make mention, and who probably reports it more exactly, for *Croke* was then but a young reporter, and *Rolle* reports it but by hearsay, for then he had not begun to study the law) reports, that judgment was given. And that case is a stronger case than this in question; and *Hale* chief justice mentions the same case in 1 *Vent.* 232. and seems to allow it. The second question then will be, whether the intention of the testator appears in this case, that the word issue should be *designatio personae*, or whether he designed it to be a word of limitation? And they held, that the testator designed it to be a description of the person, because he added a farther limitation to the issue, *viz.* and to the heirs of such issue for ever. In the case of *King v. Melling*, *Hale* chief justice said, if the limitation had been, to the issue of the issue, or the heirs of the issue, in that case the word issue should be taken as *designatio personae*, and the issue had been a purchaser. 3 *Keb.* 99, 100. And *Treby* chief justice said, that this case is distinguishable from all the other cases; for the words are, if he shall have any issue, then

Devise to E. A. for life, and if he should have any issue, to such issue and their heirs; E. A. has issue two sons; per Treby chief justice, the eldest will take a fee; per Powell justice, both will take, if E. A. has two sons, and then the devise is to the issue of E. A.

then to such issue, &c. Now the words [shall have] are conditional, and have respect to the birth of a son not then *in esse*; and the word any is all the same as one. Then in common speech when a man has a son, it is said, that he has issue; so that it is almost the same thing as if he had said, if *Evers Armyn* shall have any one son. And this is not a strained construction, considering all the circumstances of the case, for in *Burchet* and *Durdant's* case the court expounded the words [heir then living] to be all one as the word son. Then in this case, if it had been the word son, it had been without controversy. And though it was objected, that issue is a collective word, and that if *Evers Armyn* had had two sons, it had been uncertain which of them should take; he agreed, that issue was a collective word, but sometimes also it was taken simply; and when it shall be the one or the other, must be determined by the circumstances of the case; and therefore in this case the first son should have taken. But *Powell* justice said, that if *Evers Armyn* had had two sons, and then Sir *Michael Armyn* had devised to the issue of *Evers Armyn*, both the sons of *Evers Armyn* would have taken; because issue is a collective word, and it would not have been void for uncertainty, as is said, 3 *Cro.* 747. 2 *Andersf.* 134. which case he denied to be law. And *Bridgman* chief justice of the common pleas had denied the same case heretofore, in the case of *Bate* and *Amberst v. Norton*. 2. The court said, that if this should be construed an estate tail in *Evers Armyn*, some of the words in the will must be rejected, as, 1. The clause without impeachment of waste, for every tenant in tail is dispunishable of waste. 2. The word heirs limited after issue male; which will apparently oppose the intent of the devisor, for he intended that all the daughters of such issue should inherit, for the words will convey a fee to the issue; but if it should be made an estate tail in *Evers Armyn*, all the daughters of the issue would be excluded, because it must be an intail male, if it is any intail.

Objection. It was objected at the bar, that it was the devisor's intent, that every issue male of *Evers Armyn* should take; but if the court construe this a purchase in the issue male, then a posthumous son of *Evers Armyn* cannot take. For if he could take, it must be, either by way of contingent remainder, or of executory devise. Not the first, because the remainder will not vest before the particular estate determines, *viz.* before the death of *Evers Armyn*. And executory devise it cannot be to such a posthumous son, because it will not happen within the usual time allowed for executory devises to take effect, which is but the space of the life of one man then *in esse*; but this would be too long a time, being after the death of *Evers Armyn*.

Answ.

Answ. But to this objection *Powell* justice said, that there were ^{Executory} two sorts of executory devises; the one where the intire estate passes ^{devise.} out of the devisor, as 2 *Cro.* 590. *Pell's and Brown's case.* 2 *Roll. Rep.* 217. (which *Treby* chief justice said was properly the executory devise); the second sort is a sort of future devise, in which in the mean while the land descends to the heir of the devisor, as *Hainsworth and Pretys case*, 3 *Cro.* 919. and the time allowed for such to take effect, was no more than one life then *in esse*. But *Powell* justice said, that if this had been a devise to *Evers Armyn* for life, and if after his death he should have a posthumous son born by his wife, then to such son and his heirs, and if not, then to Sir *Thomas Barnardiston* in fee; he was of opinion, that if *Evers Armyn* in such case should have a posthumous son, he would have taken by way of executory devise; for though this would not happen within the life of *Evers Armyn*, yet happening so short a time after the death of *Evers Armyn*, as it must be to be the son of *Evers Armyn*, he was of opinion, that this would have been a good executory devise. But *Treby* chief justice doubted much of that, and was of opinion, that the time allowed for executory devises to take effect ought not to be longer than the life of one person then *in esse*; and so it was held in *Snow and Cutler's case*. But in this case the whole court was of opinion, that this was a contingent remainder to the issue of *Evers Armyn* in fee; and therefore a posthumous son could never take for want of a particular estate to support the remainder, until he came in *esse*. And if the limitation had been to the first son, it had been the same thing, for a posthumous son there could not have taken; and though the intent of the devisor might be otherwise, yet his intent could not controul a rule of law so strongly established, that a contingent remainder ought to vest during the particular estate, or *eo instante* that it determines. And for these reasons all the court held, that *Evers Armyn* took an estate for life by this devise, remainder contingent to his issue male in fee.

Devise to E.A. for life; and if after his death he should have a posthumous son, then to him and his heirs; and if not, to Sir T. B. in fee, a posthumous son will take, per *Powell* justice; contra per *Treby* chief justice. 1 *Lev.* 135.

Contingent remainder.

2. point. The second point was, whether this estate limited to Sir *Thomas Barnardiston* was a remainder vested, or contingent, or an executory devise. If it was a remainder vested, then *Evers Armyn* being but tenant for life, by his recovery had forfeited his estate, and Sir *Thomas Barnardiston* might take advantage of it; or if it was an executory devise to Sir *Thomas Barnardiston*, the recovery will not bar it; but if it was a contingent remainder, then it was destroyed by the recovery suffered by *Evers Armyn*.

Remainder
vested or con-
tingent.

Nevil justice was of opinion, that this was a remainder vested in Sir Thomas Barnardiston, for which he relied upon *Hutt.* 118. *Napper v. Sanders*, *Cro. Car.* 363. And as to the case of *Plunket v. Holmes*, 1 *Sid.* 47. he said, that admitting it to be law, it differed from this case; for there it was one intire clause, but here there are intervening clauses between the devise to *Evers Armyn*, and that to Sir Thomas Barnardiston; wherefore he was of opinion, that the recovery was a forfeiture of the estate of *Evers Armyn*, and that Sir Thomas Barnardiston might take advantage of it, and consequently that the judgment ought to be for the defendant. But *Treby* chief justice and *Powell* justice held, that this was a plain contingent remainder; and though *Evers Armyn* forfeited his estate upon the recovery, yet it destroyed the contingency. For where a contingency is limited to depend upon an estate of freehold, which is capable to support a remainder, it shall never be construed an executory devise, but a contingent remainder. 2 *Saund.* 388. and *Reeve and Long's* case, adjudged in *C. B.* and affirmed in *B. R.* upon error brought; though the judgment was reversed in the house of lords, but, &c. For executory devises are only admitted in cases of necessity, with caution that they do not introduce any inconvenience, as perpetuities, &c. *Co. Li.* 18. 1 *Co.* 85. *Vaugh.* 296. The first remainder therefore in this case was a contingent fee to the issue male of *Evers Armyn*; and this remainder to Sir Thomas Barnardiston is contingent also, not contrary to, but concurrent with the former, according to the notion in *Plunket and Holme's* case (*intr. Hill.* 1658. *B. R. Rot.* 521.) and is a contingency with a double aspect. For if *Evers Armyn* had had issue male, then the remainder had vested in such issue male in fee; if he died without issue male (that is to say, said *Treby* chief justice, if he never had issue male) then to Sir Thomas Barnardiston in fee. And these are not remainders expectant, the one to take effect after the other, but are contemporary. And as to the objection, that this differs from the case of *Plunket* and *Holmes*, because there were intervening clauses, they answered, that that would make no difference.

And as to the objection, that this remainder was vested in Sir Thomas Barnardiston.

They answer, that after a contingent fee is limited, no subsequent limitation can be vested. 10 *Co.* 85. *Leonard Loveis's* case. But the devise here to the issue male is a fee, as before is said, and therefore the remainder to Sir Thomas Barnardiston could not vest. But where the mean estates are particular estates (whether they are

are vested or not) a remainder limited over may vest. And the cases *Hutt.* 118. and *Cro. Car.* 363. are of mean particular estates, and therefore there the remainder might well vest; for in the latter case (which is ill reported by *Croke*) it appears in *Little. Rep.* 159. that the mesne estate was adjudged an estate-tail; and therefore that will be no authority to govern this case. Therefore they concluded, that *Evers Armyn*, having destroyed the contingent remainder limited to *Sir Thomas Barnardiston* by the recovery, gained a fee; and though it was tortious, yet it will be good against all persons, but the right heirs of *Sir Michael Armyn* the devisor.

Serjeant *Levinz* objected, that upon this verdict the plaintiff could not have judgment, for when *Evers Armyn* suffered the recovery, and entred, having forfeited his estate for life, he became a disseisor; then when *Sir Thomas Barnardiston* entred, he was a disseisor; then when *Armyn Bellingham* entred, claiming by the devise of the disseisor, he could not be in at a better condition than the disseisor was, and therefore when he entred he was a disseisor; so that *Sir Thomas Barnardiston* was seised in fee at the time of the demise to *Syms*; and whether it was a rightful or a tortious seisin, against a disseisor, is not material. And therefore the issue is found for the defendant.

But to this objection the court answered, that *Armyn Bellingham* entred by title; for admitting that *Evers Armyn* was a disseisor, yet he had right against all persons except the disseisee, and consequently his devisee has the same right; and then the seisin of *Sir Thomas Barnardiston*, which he had gained by abatement, was avoided; and so the issue for the plaintiff. And therefore judgment was given, that the plaintiff should have return, &c. For judgment is entred upon the record for the plaintiff.

Serjeant *Pemberton* moved to amend a fine, in which *Sir John Forth* was conusee, and *Sir Manwaring* conusor, which was levied of the manor of *Ighfield*, where the deed, which declared the uses, was of the manor of *Ightfield*, which was the true name. And it was amended.

Obj.
For whom the
issue is found?

Answe.

1 Wms. 519,
420.
Adjudged for
the heir at law
of *Evers Ar-*
myn in parlia-
ment, A. D.
1717. inter
Barnardiston
and *Carter*.

As also Agone on
Conting. Rem. 11th
Fine amend- ed. 3A2.

ed.
N. this is
every day's
practice in the
C. B.

H h h

Birt

Birt qui tam *vers.* Rothwell.

Intr. H. 8 Will. 3. C. B. Rot. 1608.

S. C. Lutw.
140.Action upon
stat. 21 Hen.
8. cap. 13.Lev. 296.
12 Mod. 602.
Cro. Jac. 111.
21 Hen. 8.
held at London,
not at West-
minster 3 Nov.See 2 Cro.
111. Ford
v. Hunter
& 139.
Cro. Car. 232.
Parliament
held such a
year of the
King without
shewing the
commence-
ment.*Usque ad* such
a day in cases
of acts of par-
liament al-
ways includes
the day; in
other cases it
excludes it.
Prorogation is
not found in
the rolls till
the time of
Edw. 4.

THE plaintiff brought an action upon the statute 21 Hen. 8. cap. 13. for 25^{l.} for non-residency by the defendant for five months. The defendant pleaded a former action depending. The plaintiff replied, that it was brought by fraud, &c. And issue thereupon and verdict for the plaintiff. And Jenner serjeant moved in arrest of judgment, that the plaintiff has misrecited the statute. For he says, that by a statute made at the parliament held and begun the third of November 21 Hen. 8. at Westminster, &c. whereas there is no such statute; for the parliament was held the third of November at London, and was adjourned afterwards to Westminster, and he cited 3 Cro. 853. *Bond v. Tricket*. And serjeant Wright of the same side, produced a copy of the writ of summons, which was to appear the third of November at Bridewell in London; and so is the title of the act upon the parliament rolls. Levinz *e contra* for the plaintiff, said, that all the precedents are as the plaintiff has declared. *Rast. Entr.* 599. *Robins. Entr.* 414. exprefs. And the defendant in his plea has pleaded the statute, as the plaintiff has done in his declaration. And the parliament might meet the third of November at London, and be adjourned the same day to Westminster. But he confessed, that the surest way of pleading is to shew, that the parliament was held such a year of the King, without taking notice of the commencement, which is good pleading. And as to the case in *Croke*, the exception was taken there, but what was done upon it *non constat*. But Wright answered, that it appeared by the printed statute book, that the parliament was not held at all at Westminster the third of November; for it is said, that it was prorogued to Westminster, and continued there forty-four days, viz. *usque ad* the seventeenth of December. Now there are forty-four days exclusive of the third of November. For the *usque ad* in such cases of acts of parliament always includes the day to which the *usque ad* is applied; to which the court agreed, but in all other cases the *usque ad* is exclusive of the day; but in cases of acts of parliament it is usually said, that the parliament was held *usque ad* such a day, *quo die* it was prorogued. And Treby chief justice said, that the word *prorogation* was not found upon the rolls, until the time of Edward the Fourth. But as to the principal case, the court said, that they ought to be very nice, how they proceeded in this case, since there are many precedents of the same nature, and therefore *curia advisare vult*. Then it was moved on the behalf

behalf of the defendant, that a *recordatur* might be entred, to hinder any alteration of the record. But *per curiam*, that practice is not now in use. But Cook chief protonotary said, that the use heretofore of entring a *recordatur* was, *recordatur*, that this record is without alteration or interlineation; and then if there were any alteration afterwards, it would appear upon the record, to have been made after the *recordatur* entred. But now the practice is, to make a rule of court, that all things shall continue *in statu quo*; and then it shall be tried by *affidavit*, whether there has been an alteration or not. *Post.* 343, 382.

v. Lee.

False judgment was brought, to reverse a judgment of an inferior court, where the plaintiff declared, that the defendant being indebted to him in such a sum for money before to him lent, he assumed to pay him at such a place *infra jurisdictionem curiae*. The defendant pleaded, *non assumpsit infra sex annos*. And upon issue joined, verdict for the plaintiff, and judgment. And exception was taken, that it is not said, that the money was lent *infra jurisdictionem curiae*. And for this cause the judgment was reversed. For, *per curiam*, though the debt is transitory, and is a debt in every part of England, yet it ought to be laid, to arise within the jurisdiction of the inferior court. But if the plaintiff had shewn, that the money had been lent *infra jurisdictionem curiae*, or if it had been for goods there sold; the plaintiff would have had no need to say, that the defendant assumed to pay *infra jurisdictionem curiae*; because the law creates the promise upon the creation of the debt; which debt being within the jurisdiction, the promise shall be intended there also.

Earl of Hereford *versus* Syly.

TRESPASS for taking of a boat. The defendant pleads, that it was wrecked, and cast by the sea upon the close of the plaintiff, and that the defendant seized it as belonging to the King. The plaintiff replies, and prescribes for wreck. The defendant demurs. And motion was made, that the defendant might waive his demurrer, because the King was concerned, and take issue. But *per curiam*, that is, when the King is party to the record, he has such a prerogative; but every person, who sets up a title for the King has it not, as the defendant does in this case. But *adjournatur*.

Drinkwell

Drinkwell *vers.* Fowkes.

Estoppel by
the *teste* of the
original.

DEBT upon judgment. The defendant pleaded in abatement, that a writ of error was sued such a day upon the judgment, which writ of error is still depending undetermined, &c. The plaintiff replies, that the original in debt was sued, before the writ of error was sued, as appears by the *teste* of the original. The defendant rejoins, that the original bore *teste* such a day, which was before the writ of error was sued; but that in fact the original was not sued out until such a day, which was after the writ of error was sued. The plaintiff demurs, supposing that the defendant was estopped by the *teste* of the original. And of that opinion was *Treby* chief justice, who cited this case as adjudged; Debt was brought upon a penal law, which by the statute ought to be sued within a year; the defendant pleaded the statute, and that one year was elapsed before the suing of the action, &c. the plaintiff replied, that he sued an original *teste* such a day, which was within the year; the defendant rejoined, that though the writ bore *teste* within the year, yet it was sued after the year; the plaintiff demurred; and adjudged by the whole court, that none shall be admitted, to aver, that an original was sued at any time contrary to the *teste*. But *Powell* justice was of the contrary opinion, and said, that if a man is arrested, and afterwards a writ is sued with a *teste* antedated; in false imprisonment this may be avoided by pleading. *Ajournatur*.

Post. 409, 486.

Wood v.
Newton,
Mic. 20 Geo.
2. B. R.

Braithwait *vers.* Matthews. C. B.

Post. 397, 423. **M**Attheus libelled against Braithwait in the spiritual court, for having said; Matthews is a rogue, a cheating rogue, and keeps rogues company. Prohibition was granted.

Hilliard *vers.* Jeffreson.

A Parson libelled against the defendant in the spiritual court of York, for having cut elms in the church-yard. Prohibition was granted, upon suggestion, that they grew on his freehold.

Easter

Easter Term

9 Will. 3. B. R. 1697.

Sir John Holt *Chief Justice.*

Sir Thomas Rokeby

Sir John Turton

Sir Samuel Eyre

} *Justices.*

Dr. Greonvelt's case:

DR. *Greonvelt* being committed last vacation by the censors of the college of physicians, was this term brought into the King's Bench by *habeas corpus*, upon which the gaoler returned, that the said doctor being examined last vacation, and convicted, by the censors of the college of physicians for his ill practice upon the body of *J. S.* in the year 1692. by which the said *J. S.* died, was fined by the said censors 20 *l.* and committed to gaol, until he should be delivered by the said college, or otherwise by due course of law. Upon which return the court resolved several points.

S. C. 1 Salk;

144, &c.

Carth. 421,

492.

See Comyns

76.

Commitment by the censors of the college of physicians for male practice.

Until he should be delivered by the college, or due course of law.

1. Ref. That the sentence or judgment was too general, for the cause of commitment ought to be certain, to the end that the party may know for what he suffers, and how he may regain his liberty; if he was committed for the fine, it ought to be until he pay the fine; but if the intent of the censors was to punish him, not only by fine, but also by imprisonment, they ought to have made them two distinct parts of the judgment, by condemning him to prison so long, and from thence also until he should pay the fine.

2. Ref. That the King is *creditor poenae* (as *Rokeby* justice termed it) and that all fines for offenses *de jure* belong to him; because it is his correction, and the publick revenge is in his hands;

3 Salk 285.

The King may grant fines.

but

but yet the King may grant them, as in this case he has done to the college of physicians; and in like manner many lords of liberties have the fines for offenses committed within their lordships.

An offense being pardoned, the fine is pardoned.

3. Ref. That although the fine belongs to a subject by the King's grant, as in this case to the college of physicians; yet the King by pardon of the offense before the fine is set, may in like manner pardon the fine. And as to the objection, that by this means the King may make his own grant ineffectual; the court answered and resolved, that the King neither by grant nor otherwise can pass his power, or extinguish that power which he hath to pardon offenses. For *per Holt* chief justice it is a personal trust and prerogative in him, for a fountain of grace and bounty to his subjects, as he observes them deserving or useful to the publick. And *per Rokeby* justice, as he cannot but have the administration of publick revenge, so he cannot but have a power to remit it by his pardons, when he judges it proper. Of necessity then, when the offense is pardoned, the fine is destroyed, to whomsoever it may belong; because the fine is the penalty of an offense; and as there is no offense where the crime is pardoned, so there cannot be any penalty imposed for the offense.

4. The fourth point, if the *mala praxis* of the doctor in the year 1692 was not pardoned by the several acts of grace which have been made since; for then the commitment was illegal, tho' imposed only for a punishment, and not for the fine. And it was argued, that this power of correction in the hands of the college was in nature of a private judicature; instituted for the redress and reparation of those persons, who lose their friends by such prejudicial means; that it is their satisfaction and right, as an appeal is; for this male practice has injured a private person, and the law allows him satisfaction by this punishment; the name of the King is not used in the proceedings, as in an indictment or information; therefore the offense ought to be regarded, not as an injury to him but to the party, for which this punishment is *quasi* a recompense, and therefore cannot be pardoned, no more than an appeal.

But the court resolved, that *mala praxis* is a great misdemeanor and offense at common law (whether it be for curiosity and experiment or by neglect) because it breaks the trust which the party has placed in the physician, tending directly to his destruction. But yet the King may pardon it, as he pardons greater crimes. And the proceedings against the doctor in this case were not, as was objected, for reparation to the party, for that ought to be by action upon the case, nor is it a civil prosecution as an appeal is; but

but a sort of criminal proceeding for the correction of the doctor; and that therefore it could not be at this time (after so many general pardons) imposed upon him. And the doctor was discharged.

Rex vers. Ingram et al'.

Ingram and a hundred others being found guilty of a riot upon two inquisitions taken before justices of peace according to *Hen. 4. cap. 7.* now moved in arrest of judgment. Upon which these points were resolved by the court.

S. C. 12 Mod.
123.
S. C. 2 Salk.
593.
Carth. 383.
Comb. 423.
T. Raym.
386.

1. When a riot is suppressed by the justices together with the sheriff, having the *posse comitatus* with them for that purpose, and they convict the rioters by a record of the force upon their proper view, the sheriff ought to be party to such inquisition, and so he ought by the 19 *Hen. 7. c. 13.* But if the rioters disperse of themselves, and after they are parted, an inquisition is made of it by two justices of peace; there is no need, that it appear by the inquisition that the sheriff was party to the inquiry; because the justices may make the inquisition without him.

Inquisition for
a riot suppressed
by the sheriff
and justices
with the *posse
comitatus.*
Hale's Hist.
Pl. Cor. Vol. 1.
fol. 496.
Before two ju-
stices of peace.

2. When the conviction of a riot is by inquisition taken before two justices of peace, the inquisition has no need to be, as taken *pro domino rege et corpore comitatus*, but *pro domino rege* is sufficient, or rather better; for their inquiry is not for the county, but for the King, and so is the constant form of such inquests. But when an inquisition is by the grand jury, then it ought to be *pro domino rege et corpore comitatus*. Sir William Williams objected, that *et corpore comitatus* was ill, because their authority was not divided, or derived partly from the King and partly from the county, but from the King only, and executed only for him; and therefore (by him) it ought not to be *pro corpore comitatus*. But this nicety was not regarded, and the court seemed to be of opinion that they were the same.

3. That tho' the words of the statute are, that the justices, &c. shall make inquiry within one month after the riot, &c. yet an inquiry by them after the month is good. For the statute intended only to hasten their proceedings, by subjecting them to the penalty in case they did not make inquiry within the month, and not to restrain their authority to the month, so as it could not be executed afterwards: for the lapse of the month makes them incur the penalty, but does not determine their power.

After the
month.
Comb. 173.
Sid. 186.
Hawk. 163.
c. 65. s. 31.
6 Mod. 140.
141.
See now the
stat. 1 Geo. 1.
cap. 5.

Guilliam *vers.* Hardy.

S. C. 3 Salk.
320.
S. C. Carth.
391.

Ante 157.

GUILLIAM brought a *scire facias* against the defendant as bail to J. S. in an action brought by the plaintiff Guilliam against him in the palace court, in which action the plaintiff obtained judgment; and this *scire facias* was to shew cause, why the plaintiff should not have execution generally, &c. The defendant pleads payment by the principal before the return of the second *scire facias*; which was agreed to be a bad plea, because the recognizance was forfeited by the return of the first *scire facias*. The plaintiff demurs, and adjudged that the *scire facias* ought to abate. And resolved,

Bro. Certiorari, pl. 11.
1 Ref.

Certiorari re-

moves a record into B. R. The same law in C. B. so held by all the judges Hil. 8 & 9 Will. 3. C. B. 1696.

2. Ref.

Scire facias to have execution of a judgment removed out of an inferior court.

If the judgment of an inferior court is removed into B. R. by *certiorari*, and the party sues a *scire facias* to have execution upon such judgment; he ought to shew in his *scire facias* that it is the judgment of such an inferior court removed hither by *certiorari*, and ought to shew the particular limits of the inferior jurisdiction, and pray execution within the particular limits. But if the judgment be removed into B. R. by writ of error, and affirmed, the party may have execution in any part of *England*, for by the affirmation it is become the judgment of the King's Bench. But in a *scire facias* upon such a judgment affirmed here the plaintiff ought to allege, that it was removed hither by writ of error. And with this agrees 1 *Sid.* 213. *Hutt.* 117, 118. *Risam vers. Godwin.* And therefore because in the principal case the *scire facias* did not express by what means the judgment was removed into the King's Bench, and general execution is prayed, where it does not appear to the court, that they can grant such general execution, for perhaps the record was removed by *certiorari*: For this reason the court adjudged, that the *scire facias* ought to be abated.

3. Ref.

Scire facias upon a record of an inferior court.

Ray. 50.

The *scire facias* was ill, because it recited the judgment of the inferior court, *sicut per inspectionem recordi nobis constat*; for if the defendant pleads *nul tiel record*, it ought to be tried by the record itself, and not *per inspectionem recordi*. But it ought to have been *prout patet per recordum*. And therefore for these reasons the *scire facias* was abated. *Jacob.*

Parker *vers.* Mellor.

Replevin. The defendant pleads property in *Y. S.* and prays *returno habendo*. And exception was taken to the plea, that the defendant could not have return, because he confessed the property in a stranger. And Mr. Cartbaw for the defendant cited a case between *Butcher* and *Porter*, *Hil. 4 Will. 3 Mar.* where property was pleaded in bar as in this case, and return was granted. And he took this difference, that where the plea goes to the point of the writ, so that you can never have such a writ, there you can never keep the cattle; otherwise where the plea goes in bar of the action. And he cited 2 *Cro.* 219. And *Holt* chief justice remembered the case between *Butcher* and *Porter*, and return was granted there, because the plaintiff had not any right to the cattle. And he cited 39 *Hen.* 6. 35. where though the avowry was ill, yet the plaintiff having no right a return was granted. And therefore in this case judgment was given for the avowant, and a return granted. *Jacob.* The same point resolved *Pasch. 10 Will. 3. B. R.* between *Parrel* and *Scrimshaw*.

Vent. 249.
2 Lev. 92.
Post. 2 vol.
S. C. 12 Mod.
122.
6 Mod. 81.
2 Cro. 519.
2 Ro. Rep.
64, 65.
6 Mod. 103.
S. C. Carth.
398.
Defendant
pleads pro-
perty in a
stranger in
bar, he shall
have return.
Butcher v.
Porter,
1 Salk. 94.
Mich. 2 Ann.
B. R. Pref-
grave v.
Saunders,
1 Salk. 5.

Brown *vers.* Cornish.

In *debitatus assumpsit*. The defendant pleads payment according to the promises, &c. The plaintiff demurs specially, 1. Because the plea, as he conceived, amounted to the general issue. *Sed non allocatur*. For *per Holt* chief justice it is generally true, that no plea which admits, that there was once a cause of action, amounts to the general issue. 2. The second exception was, that the defendant does not pray judgment of the plaintiff's action, but says, *quod onerari non, &c.* And *per Holt* chief justice the defendant should not plead in this case, *onerari non, &c.* because the discharge is by matter *ex post facto*, and there was once good cause of action. But in debt upon bond if the defendant pleads *non est factum*; or if it be brought against an heir, and he pleads *riens per descent*, the defendant may plead *onerari non*, because he does not admit any cause of action; but in this case it could not be pleaded. And therefore judgment was given for the plaintiff. *Jacob.*

S. C. 2 Salk.
516.
Payment
pleaded speci-
ally in *indebi-*
tatus assump-
sit.
Bro. red. 93.
Bro. Vad.
Me. 98. 105.
111.
Post. 787.
Clift Entr.
203.
Salk. says the
plea ought to
have con-
cluded to the
country,
which cer-
tainly would

have been the same as the general issue. *Onerari non*, where pleadable?

A. drew a bill of exchange upon B. payable to C. or order; B. accepts it; B. pays the money to C. C. indorses the bill payable to D; D. brings case against B. who pleads payment to C. before the indorsement, D. demurs specially; and adjudged, that this amounts

It is a certain rule that in actions on the case on *assumpsit*, any thing may be given in evi.

ance on the amounts to the general issue *non assumpsit*. Adjudged Mich. 8 Will. 3. B. R. *Tercera Dimater* and *Hooper*. Reported to me which proves that the plaintiff had no cause of action at the time he commenced his suit. by Mr. Place.

Hallet *vers.* Birt.

S. C. Skin.
674.
2 Salk. 580.
Carth. 380.
5 Mod. 252.
1 Salk. 394.
Stat. Marl.
c. 21.
Stat. Westm.
1. c. 17.

Colour.
12 Mod. 121.

TRespafs for taking of three cows in a place called *B*. The defendant justifies, that the bishop of *Salisbury* was seised of the hundred of *A*. in fee, in right of his bishoprick; and then he pleads prescription for a hundred court, to be held from three weeks to three weeks; and that upon plaints levied in the said court, or before the steward out of court, replevins time whereof, &c. have been granted to him who levied the plaint, of the taking of cattle, &c. that the plaintiff *cepit et imparcavit* these three cows, being the cows of *J. S.* in the place where, &c. within the hundred; that *J. S.* levied a plaint of this before the steward out of the court; upon which the steward granted replevin, &c. by virtue whereof the defendant as bailiff of the said hundred court replevied the said cows, &c. The plaintiff demurred. And exception was taken to the plea, that the defendant should have given colourable property at least to the plaintiff; for the possession given by the plea is not sufficient colour. 5 *Hen.* 7. 18. *a.* *Bro. Colour* 43. 3 *Cro.* 262. And for default of this, the plea amounted but to the general issue. For the effect of the plea is, that these cows belong to *J. S.* Now a plea of property in a stranger amounts to the general issue, and is ill. 27 *Hen.* 8. 21. *a.*

But serjeant *Gould* for the defendant argued, that the defendant has confessed possession in the plaintiff, which is sufficient colour in trespass. 7 *Hen.* 6. 35. *a.* 14 *Hen.* 4. 25. *a.* *Fitzb. Colour* 243. And though it is objected, that the defendant has alleged, that the plaintiff *imparcavit* the cows (which is impounded) so that the cows were in the custody of the law, and not in the possession of the plaintiff; he answered, that *imparcare* signifies but to inclose, whereby the plaintiff might the better keep the cows in his possession. 2. By him, it is not necessary in this case, that the plaintiff give colour; for where the defendant by his plea makes title to himself, he ought to give colour; but not where he alleges property in a stranger, especially in the case of an officer, who might justify by reason of a process out of the King's court. Besides, that sometimes it is sufficient for the defendant to lay the whole matter before the court by special pleading, though he might have given the same matter in evidence upon the general issue. 2 *Ventr.* 295. *Hob.* 127. *Fitzb. Colour* 15.

But

But *per Holt* chief justice, *et totam curiam*, the defendant has not confessed here any possession in the plaintiff; for the defendant having pleaded, that the plaintiff *cepit et imparcavit* the cows of *J. S.* who is a stranger, though *imparcare* signifies to inclose only, yet that will not aid it; for whether the pound be private or publick, he who puts them in, has divested himself of the possession and property of the cattle. Then since the defendant has alleged the property to be in *J. S.* before and until the impounding, and at the time of the impounding they became in custody of the law, the defendant has not given any good colour to the plaintiff, because it is not continued. But the defendant ought to have pleaded, that the plaintiff *cepit et detinuit* the cows; and then he had given sufficient possession to the plaintiff. 2. After several arguments at the bar it was resolved, that the substance of the plea was ill; for the sheriff could not replevy by plaint at common law, but by writ only, and that in his county court. But by the statute he might replevy by plaint out of court. Then since the sheriff could not have done this at common law, the hundred court, which de-
 rives its authority from the county court, cannot do it by prescription. And the statute of *Marleb.* does not extend to the hundred court. Therefore this replevin granted out of this court is ill, especially being granted by the steward, who is not a judge of the court. And the usage in such case will not alter the law. Therefore judgment was entred for the plaintiff. See *Fitzb. N. B. 73.*
 2 *Inst.* 140, 141. *Co. Li.* 145. *Mr. Shelley.*

Hundred
 court cannot
 prescribe to
 grant reple-
 vins.

See *Skin. 675.*

Breedon vers. Gill.

UPON appeal from the commissioners of excise to the com-
 missioners of appeals, according to 12 *Car. 2. cap. 24.* the
 commissioners of appeals offered to proceed in the examination of
 the former sentence, upon the depositions taken at the former trial.
 Upon which a motion was made in *B. R. Mich. 8 Will. 3.* for a
 prohibition, upon suggestion that all issues ought to be tried by
 examination of witnesses *viva voce*; but that the commissioners of
 appeals proceeded upon short notes taken by the clerk of the com-
 missioners of excise, who had no authority; which was not exa-
 mination by the oath of credible witnesses, as the statute directs.
 And it was argued at bar for the prohibition by *Sir Thomas Powys*,
Sir Bartholomew Shower and *Mr. Northey*, and against the prohi-
 bition by the attorney general, the solicitor general, and *Mr. Cowper*,
 the same term. And being moved the last day of the term, *Mr.*
Howell the clerk of the commissioners of excise informed the court
 that the suggestion was false, for the examination of the witnesses
 was

S. C. Comb.
 474.
 S. C. 2 Salk.
 555.
 5 Mod. 269.
 Proceedings
 by commis-
 sioners of ap-
 peals from the
 commissioners
 of excise.
 Hob. 185.
 Post. 587.

If the suggestion appears to be false, the King's Bench will not grant a prohibition.

Post. 587.

Depositions, where evidence?

Partiality in exercising justice.

Shorter v. Friend,
2 Salk. 547.
3 Mod. 283.
If the spiritual court does not allow proof of payment of a legacy by one witness, B. R. will grant a prohibition.

was not by the clerk, but by the commissioners of excise, for they were examined in the presence of the commissioners, and upon an oath administered by their order. Upon which the court taking the suggestion to be false, denied to grant a prohibition, upon the authority of *Hob. 66.* The parish of *Aston's* case. And afterwards in *Hilary* term 8 *Will. 3.* the suggestion was amended, and framed in this manner, *viz.* that the commissioners ought not to admit the depositions taken before the commissioners of excise to be evidence, but ought to proceed upon evidence of witnesses examined before themselves *viva voce* upon oath administered by themselves, or by confession of the party. And then it was argued by the council for the prohibition, that the proceeding is irregular, because it does not pursue the direction of the statute; for all examinations ought to be upon oath by the letter of the act; and the act impowers them to administer an oath, which argues, that it was the intent of the parliament that they should proceed upon evidence given before themselves. And if the act had not prescribed this method, the common law would have supplied it, which says, that all proceedings ought to be by examination of witnesses *viva voce*. Besides, that this proceeding upon the depositions before taken cannot be a sufficient ground for the commissioners of appeal to found their judgment; for the evidence (notwithstanding) may be misrepresented, or evidence taken of the one side only. If sentence be given against a man before the commissioners of excise by default, if the commissioners of appeals upon appeal to them try the matter only by depositions, the party condemned will lose the benefit of cross-examining the witnesses. Depositions taken before justices of peace cannot be read upon appeal to the quarter sessions, nor can depositions taken before commissioners of bankrupts be used at a trial at common law. And therefore these proceedings being irregular, they pray the aid of this court, which ought to controul all inferior jurisdictions, and correct them in their irregular proceedings. And Mr. *Northey* cited a case in the time of King *Charles* the Second, where the mayor of *London* espoused the cause of a plaintiff so vigorously in a court of the city, that no attorney durst appear for the defendant, until *Hale* chief justice by menace of a mandatory writ out of the King's Bench allayed the heat of mayor. He cited also a case between *Shorter* and *Friend*, *intr. Hill. 1 Will. & Mar. B. R. rot. 39.* where the case was thus: *John Friend* by his will gave 10*l.* to *Martha Friend*, and made *Shorter* his executor, and died; *Shorter* paid the legacy to *Martha Friend*; and afterwards *Martha Friend* made *Friend* the defendant her executor, and died; *Friend* sued *Shorter* for the legacy devised by *John Friend* to *Martha Friend* his testatrix in the spiritual court, where *Shorter* pleaded payment, and produced one witness to prove it; and because the spiritual court refused to admit

admit the proof of one witness, prohibition was granted out of the King's Bench; and *Shorter* declared upon the prohibition, and after solemn debate consultation was denied by the whole court.

But *e contra* it was argued against the prohibition, that since the statute has given the commissioners of appeals jurisdiction in the principal matter, by implication it impowers them to proceed to the determination of the principal matter by means the most proper, and which should seem convenient in their discretions; and they have chosen means agreeable to reason, pursuant to the statute, and commodious to the parties; for the witnesses are examined and cross-examined before the commissioners of excise, and their depositions entred by the clerk in court, and subscribed by the witnesses themselves. How can it appear to the commissioners of appeals, that the party was oppressed in the former sentence, if they be not allowed the same evidence, upon which it was founded? Trial of the cause *de novo* will not be trial by appeal. When therefore these depositions are transmitted to the commissioners of appeals, and they proceed upon them, is not this proceeding upon oath? Without doubt examination upon oath in writing is examination upon oath within the intent of the statute, and more beneficial to the King and to the party; for by this the evidence, if the witnesses die, is preserved; and the proceedings upon the appeal are more expeditious, and the presence of the witnesses is not required, when their attendance is requisite in another place. In appeal to parliament no evidence is admitted, but that which was given at the former trial. And the reason why the evidence given before the commissioners of bankrupts cannot be allowed at a trial at common law is, because such matter does not come into the King's Bench, &c. by way of appeal. And the reason of the proceedings of the justices at the quarter-sessions (as is mentioned by the plaintiffs council) is, because their ancient method of proceeding was so. And in the same manner this new jurisdiction follows their proper rules; for where original matter is given to original jurisdiction, they may chuse their methods of proceeding, and no other court can over-rule them. *Holt* chief justice said, that this case seems to differ from all the cases of prohibitions which have been granted, but the case of *Shorter* and *Friend* seems to have the most resemblance. But yet no prohibition ought to be granted to the spiritual court, for having allowed evidence, which the common law does not allow. But as to the course of granting prohibitions for not allowing evidence which would be good at common law, the difference is thus: When the ecclesiastical courts are possessed of a cause, which is meerly of spiritual consequence, the courts at common law allow them to pursue their own methods in the determination of it; but when in such cause co-

Appeal in
parliament.

Ro Abr. 300.
Show. 172.

No prohibition granted to the spiritual court for allowing evidence, which the common law has not allowed.

Evidence in spiritual courts.

Appeal in spiritual courts.

lateral matter arises, which is not of their conusance properly, there the courts of common law enforce them to admit such evidence as the common law would allow. Therefore if the spiritual court require more than one witness to prove the revocation of a nuncupative will, the King's Bench, &c. does not intermeddle. But if in a suit for a legacy payment or a release be pleaded, if they do not admit proof by one witness, the King's Bench grants a prohibition. In appeal in the ecclesiastical court they examine the witnesses *de novo* upon a new allegation, but that allegation may be composed of the same fact; and the appellant does not begin to shew his *gravamen*, but the other ought to maintain his sentence. And it seemed to him, that it was reasonable, that the commissioners of appeals should have power to proceed by these depositions. But yet he could not be of opinion, that it was discretionary in the commissioners of appeals. *Et adjournatur*. And afterwards in *term. Pasch. 9 Will. 3.* the court pronounced their opinion, that the commissioners of appeals ought to administer new oaths upon the appeal; because the act of parliament is express, and has given them power to administer oaths for the same purpose. And therefore a prohibition was granted *quoad* the admitting of the depositions taken in writing before the commissioners of excise. But *Holt* chief justice said, that his private opinion was, that if the witnesses were dead, or could not be found, then the commissioners of appeals might make use of these depositions; but that not being before him judicially, he would not give a judicial opinion.

Reynolds *vers.* Gray.

S. C. 1 Salk.
70, 72.

Umpire elected by arbitrators.

PER *Holt* chief justice, if arbitrators have authority to chuse an umpire, and they chuse *A.* accordingly; they have executed their authority, and cannot make another election, though *A.* does not accept of the umpirage. *Contra*, if they elect upon express condition; for then he is no umpire, until the condition be performed. But *Rokeby* justice doubted of this, for it seems implied in the election, if the party elected will accept it. *Ex relatione m'ri Jacob.* In the same case it was said also by *Holt* chief justice, that if the arbitrators chuse an umpire, before the time for them to make their award be expired, it is void, though they are resolved to make no award themselves. *Ex relatione m'ri Jacob.*

Rex *vers.* majorem, &c. Exeter.

Trin. 9 Will. 3. B. R.

Lindstone sued a writ of *mandamus* directed to the mayor, &c. S. C. 1 Show. of Exeter, to command them to admit him to be an alder-^{258.} man of the city being duly elected. To which *mandamus* return ^{Return of} was made, that Lindstone was never elected. And it was moved, ^{mandamus by} that this was an insufficient return, because it was not under the ^{the mayor,} hand of the mayor, or seal of the corporation; and therefore it is ^{&c.} uncertain, against whom Lindstone shall have an action for this ^{12 Mod. 126.} false return. But *per Holt* chief justice, *et totam curiam*, the re- ^{Comb. 324.} turn of a *mandamus* is matter of record, and acts done by corpora- tions upon record have no need to be under hand or seal, for in such case an action lies against the body politick, or the persons who procure the false return. And a return by sheriffs had no need to be under hand and seal before the statute of York. *Ex relatione m^ri Shelley.*

Lambert *vers.* Aeretree.

Several part-owners of a ship. Some of them were desirous that the ship should go to sea, and others of them would not consent. Upon which they procure the ship to be arrested by pro- cess out of the admiralty, and compelled those who intended to send the ship a voyage, to enter into recognisance in the admiralty, conditioned that the ship should safely return. After which the ship began a voyage, in which she was lost. And upon this the persons, who were bound for the safe return of the ship, were sued in the admiralty. Upon which a motion was made, that the King's Bench would grant a prohibition. 1. Because the recogni- sance not being in nature of a stipulation, the admiralty had not power to compel the party to enter in it. 2. Because this suit be- ing in nature of debt upon a recognisance, the admiralty had not cognisance of it. But the prohibition was denied by the court (*absente Holt* chief justice) because this suit is between the part- owners of the ship, and the property is admitted; and therefore it is properly conusable there. 2. If the admiralty had not power to take such recognisances all navigation must be obstructed, if one obstinate part-owner would not consent, that the ship should make a voyage; and *e contra* it is very reasonable, that he have security, that the ship shall return in safety, since he does not consent to the voyage. *Ex relatione m^ri Shelley.* See *Littlel. sect. 323.*

Several part-owners of a ship, if some will send her a voyage, and some not, the admiralty will take security for the safe re- turn of the ship, and then she shall make the voyage. *Post. 235, 1285.* 4 Inst. 135. *Fitzgibb. 192.* *Oulton v. Hebdon,* Trin. 18 & 19 Geo. 2. B. R. Same point agreed. *M S. of Serj. Wilfon.* P. 6 Ann. B. R. 1707. *Degrave v. Hodges.*

Watkins

Watkins *vers.* Perkins at Guildhall.

Collateral
promise,
what?

Post. 1085.

PER Holt chief justice, if *A.* promise *B.* being a surgeon, that if *B.* cure *D.* of a wound, he will see him paid; this is only a promise to pay if *D.* does not, and therefore it ought to be in writing by the statute of frauds. But if *A.* promise in such case, that he will be *B.*'s paymaster, whatever he shall deserve; it is immediately the debt of *A.* and he is liable without writing.

Garbrand *vers.* Allen at Guildhall.

S. C. Comb.
450.

Trover by the
husband for
money laid
out by the
wife.

TRover brought by the husband for money paid by the plaintiff's wife to the defendant for land conveyed by the defendant to the plaintiff's wife by bargain and sale without the husband's knowledge. And *per Holt* chief justice, if articles of agreement are made by a *feme covert* by the order and appointment of her husband, and the money is paid by the wife in pursuance of such agreement; or if the husband (though not privy at the time of the purchase) afterwards consents to it: the property of the money is altered; and the husband cannot maintain *trover*. But if he is not privy to such purchase, nor agrees to it; *trover* will lie for him against the vendor, who receives his money of his wife.

Bolton *vers.* Hillersden at Guildhall.

S. C. Comb.

450.

3 Salk. 234.

Master charg-
ed by the act
of the servant.

Show. 95.

2 Vern. 643.

THE defendant being a merchant, his apprentice delivered a note to the plaintiff obliging his master to pay 100 l. to the plaintiff or his order, according to the custom of merchants. Upon this note *assumpsit* was sued against the defendant. And upon evidence at the trial the plaintiff proved this note to be the writing of the apprentice, and that the apprentice had once given such a note to Mr. *Monpeffon* for money received by the apprentice of Mr. *Monpeffon*, which money was applied to the master's use, and that Mr. *Monpeffon* had recovered the money of the master. The proof for the defendant was, that he did not trust his apprentice to give such notes; and that was proved by several, who had been his apprentices. The apprentice himself swore, that he had lost 100 l. of his master's money at play, and that the day following a foreign bill was drawn upon his master, which he could not pay, and the money which he had lost at play both; therefore he resorted to the plaintiff *Bolton*, with whom *Hillersden* usually had dealings: and because the person who brought the foreign bill, would

would not receive *Guineas*, being the only money that he had, he persuaded the plaintiff, to receive the *Guineas*, and pay the foreign bill, which the plaintiff did; and that the apprentice gave this note to the plaintiff, for money received of him to pay the 100 l. which he had lost at gaming. And per *Holt* chief justice, in *Stowell's case*, it was resolved, that though *Stowell* gave ready money to his servant to buy provisions, yet the servant took them upon tick, and because they came to the use of *Stowell*, he was adjudged liable, but he doubted of it. So in the case of *Sir Robert Wylands*, *Sir Robert Wylands* every *Saturday* gave the servant money, to discharge the expenses of the week; the servant did not pay the money due for several weeks together, though he received it of his master; yet the vendor recovered against *Wylands* for goods delivered to the servant; because every man ought to take care what servant he makes use of; and if the master happened to have a bad servant, it is more reasonable, that he should suffer for the negligence or villany of his servant, than a meer stranger. 2. By *Holt* chief justice, if a master has never intrusted a servant, to charge him by signing of notes in the master's name; yet if the money, for which such note is signed, comes to the use of the master; or if in this present case the servant gave the note to raise money to pay the foreign bills charged to his master, which is for the benefit of his master; such note will bind the master, though he never permitted the servant to sign such notes before. But if in this case the note was given for the money which the apprentice had lost at gaming, and which did not come to the master's use, the master ought not to be bound by it. But the jury gave a verdict for the plaintiff, which *Holt* well approved.

Rex vers. Chalke.

Hil. 8 Will. 3. B. R.

UPON a *mandamus* directed to the corporation of *Wilton*, S. C. Comb. to command them to restore an alderman, they make return, that he being mayor such a year, misemployed the revenue of the corporation, &c. to such use, &c. and that he rased one of the books of the corporation, &c. and that being charged with these crimes, he had been heard what he could say in his defense, and therefore they removed him, &c. And *Mr. Northey* took exception to the return, because it does not appear, that the party was summoned; and the rule in *Glide's case* in this court, *Trin. 4 Will. & Mar.* was, that summons was necessary in all cases of disfranchisement, except where the party does not live within the corporation, but in some distant place. And though it is said, that

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Stowell's case.

Sir Robert Wylands's case.

396.

Disfranchisement.

2 Salk. 434.

Sty. 446, 452.

Rex v. Glide.

4 Mod. 33.

Notice.

Common seal.

Common council.

Cause of disfranchisement.
12 Mod. 113.

he was heard; that might be without summons, and therefore unprepared. But *per Holt* chief justice, a man ought not to be disfranchised until he has been heard in his defense, upon notice and preparation; and summons is only necessary for that purpose. Therefore if a man be charged *in plenis comitiis*, and ordered to prepare by such a time, this will be good, though there be no actual summons; for summons is only to give the party opportunity to make his defense, and if he be heard, &c. it is enough. And he said, that he remembered a case, where the return was, that the party disfranchised being in common council, was examined touching such affairs; and not being able to give sufficient answer to it, was disfranchised. 2. The second exception was, that it is not said that the order to remove him was under the common seal of the corporation. But *per Holt* chief justice, if a burgess be constituted by patent under the common seal, he ought to be discharged in like manner; but if by election, there it is only entred in the book, and an order is sufficient to discharge him, so that they may disfranchise him without any instrument under their common seal. And (by him) a common council is incident to all corporations of common right, unless it be otherwise provided by the patent of creation. 3. The third exception was, that the offenses were not sufficient causes of disfranchisement; for as to the misemploying or nonpayment of the money, that is no cause of forfeiture, because the corporation may have their action for it: besides, that it is not said, that he was required to give any account for it. And as to the rasing of the books, it may be that the entry was wrong, and he only made it as it ought to be; for it is not averred that it was as it ought to be, nor is the rasure averred to be to the detriment of the corporation. And of this opinion was the whole court, and therefore a peremptory *mandamus* was granted. *Ex relatione m^ri Jacob.*

Trinity Term

9 Will. 3. C. B. 1697.

Sir George Treby Chief Justice.

Sir Edward Nevill } Justices.
Sir John Powell }

Memorandum, *Sir John Somers knight, keeper of the great seal, was created baron of Evesham, and lord high chancellor of England.*

Williams vers. Lacy.

Ejectment for lands in *Somersetshire*, upon the demise of *S. C. 2 Salk.*
Susanna Lacy. Special verdict, that *William Lacy* seised ^{568.}
of the lands in question in fee, by lease and release bearing ^{Carth. 472.}
date 1 *Apr.* 1675, conveyed these lands to the use of ^{1 Show. 347.}
himself for life, remainder to *William* his son and the heirs males ^{S. C. Comb.}
of his body, remainder to the heirs males of his own body, re- ^{425.}
mainder to his own right heirs; the jury find, that *William* the ^{Pigot 29, 31.}
father died; *William Lacy* the son entred, and was seised in tail ^{Noy 126.}
male; that 2 *Will. 3. Mar.* *John Keite* sued a *praecipe* bearing ^{Pigot 58, 59.}
teste the seventh of *November* against *Miles Corbet* for these lands, ^{Vide Stat. 14.}
which writ was returnable *quinden. Martini*, at which day *Miles* ^{Geo. 2. c. 20.}
Corbet appeared, and vouched *William Lacy* the son, who was not ^{concerning}
present in court, upon which a *summoneas ad warrantizandum* is- ^{common re-}
sued, returnable *octabis Hilarii* following; that in the mean while ^{coveries.}
between the *teste* of the *summoneas ad warrantizandum* and the re- ^{Recovery}
turn of it, *viz.* the second day of *January*, *William Lacy* the son ^{without te-}
by lease and release conveyed the lands to *Miles Corbet*, to make ^{nant before}
him complete tenant to the *praecipe*; that afterwards the recovery ^{the *summoneas*}
passed, which was to the use of *William Lacy* and his heirs; that ^{*ad warranti-*}
^{*zandum* sued,}
^{but afterwards}
^{and before the}
^{return of it}
^{a tenant made,}
^{is a good re-}
^{covery.}
William

William Lacy died seised without issue male, leaving the lessor of the plaintiff his daughter and heir; that the defendant was brother to *William Lacy*, and claimed by virtue of the intail to *William Lacy* the father and the heirs male of his body; *et si, &c.* The single question was, if a common recovery, in which there is no tenant to the *praecipe* at the return of the writ, but the person against whom the *praecipe* is sued is made a good tenant before the return of the *summoneas ad warrantizandum*, and afterwards the recovery passes, be good or not. Gould King's serjeant for the plaintiff argued, that in all cases of adversary writs it is clear, though the party was not tenant at the time of the *teste*, but was made a good tenant before the return, it shall be well enough. But suppose that he was not tenant at the return, then by plea of non-tenure he might abate the writ, but if he vouch over, as to himself he admits the writ good, but the vouchée may counterplead the tenancy; but if he does not do it, the recovery will be good against all by estoppel; but in such case the tenant will not recover in value, because he has lost nothing. But if he become tenant after the voucher, and judgment is given (which is not given upon the *praecipe*, but upon the last voucher) this judgment binds the land; so that when the recoveror takes execution, the tenant cannot avoid it for this subsequent purchase; so that then the tenant loses the land, and then he will recover in value against the vouchée, and the vouchée over. But if it be but a recompense by estoppel, yet it will conclude all parties and privies, and be a good bar to bar them. *Stile* 319. 26 Hen. 6. 49. *Bro. Counterplea de voucher* 32. *Recompense in value* 30. *Godb.* 218. If the law be so in adversary writs, as (said he) it is, much more ought it to be so in case of a common recovery, of which the law takes notice as a common conveyance; and therefore the court will make it good, if it be possible. And for an authority in point he cited a case between *Samburn* and *Belt*, Hil. 3 Will. & Mar. B. R. where in error to reverse a common recovery it was adjudged by the whole court, that if there is a good tenant to the *praecipe* at any time before the recovery passes the recovery shall be good; but there the writ of error abated for another reason.

Samburn v.
Belt, 1 Show.
347.

Wright King's serjeant for the defendant argued, that there must be a good tenant to the *praecipe* at the return of the writ, or otherwise the tenant might abate the writ by the plea of non-tenure (for he cannot render the land, as the writ commands, if he has it not) but if he does not plead it, it shall be good by estoppel only, and bind the tenant and his heirs. And all the books cited on the other side are of tenants in fee. Then this being good only by estoppel, it shall not bind the issue in tail; because he does not claim as heir only, but also *per formam doni*. Then in this case although

although the recovery be good by estoppel as to the parties, yet it, Co. 3. will not bind the defendant, who claims as issue in tail. And as to the case of *Samburn and Belt* it was adjudged upon other points.

But the whole court was of opinion for the plaintiff. For it is a clear point, that a man may be tenant to the *praecipe* at any time before judgment given. And the difference is, if the tenant comes to the land by his own act, as purchase, after the *teste* of the writ, he can never plead it to abate the demandant's writ, for by this he has made the writ good; but if he comes to the land by act in law pending the writ, he may abate the writ by pleading nontenure. Therefore if a *praecipe* be brought against the son in the life of the father, and after the return of the writ the father dies; though he is tenant, yet since it is by act in law, he may notwithstanding plead nontenure. The same law if a *praecipe* be sued against the reversioner, living the tenant for life, and tenant for life dies before judgment, yet the reversioner may plead as above. But if the reversioner had accepted a surrender of the tenant for life pending the writ, this would have made the writ good, because it was his own act. 1 Hen. 6. 1, 2. 8 Edw. 3. 82. 37 Hen. 6. 16. 3 Hen. 7. 8. And the case in 41 Edw. 3. 5. is a strong case, for there a *praecipe* was sued against *A.* who pleaded that he was not tenant of the land at the time of the writ purchased, but that *B.* was tenant, against whom he sued a formedon upon a gift in tail made to his grandfather, to whom he is heir in tail, and that he recovered upon the formedon, and sued execution by *scire facias*, &c. and it was objected, that *A.* was now in by descent, which was an act in law; but *Kirton* there said, since he hath sued execution by *scire facias*, he has affirmed the demandant's writ good, because it was his own act; to which *Finchden* chief justice agreed. And 5 Hen. 5. 9. and *Noy* 126. agree this diversity. And therefore for these reasons the court were clear of opinion, that the recovery was good; but upon the importunity of the defendant's counsel they gave them time till *Michaelmas* term, to search for something more to say for the defendant. And after arguments at the bar in *Michaelmas* and *Hilary* terms following, in *Easter* term, 10 Will. 3. C. B. judgment was given for the plaintiff by *Nevill, Powell*, and *Blencowe* justices, *Treby dubitante*. Post. 475.

Truscott *vers.* Carpenter and Man.

THE plaintiff brought an action of trespass, assault, battery, wounding and imprisonment, against the defendants; and declares, that the defendants at such a day at *St. Ree* in *Cornwal*, assaulted, beat, wounded, and imprisoned him, and detained him

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in prison until he paid a fine of 3*l.* 16*s.* and 8*d.* &c. The defendants to the wounding plead not guilty; and *quoad totum residuum transgressionis, insultus, et imprisonamenti*, they plead, that the defendant Carpenter entered a plaint in debt against the plaintiff in the court of *Launceston* in *Cornwall* for a debt due to him *infra jurisdictionem curiae*; that a summons issued thereupon against the plaintiff, and *nichil* was returned thereupon; then a *capias* issued directed to the defendant *Man*, to seize the plaintiff, which was awarded the 27th of *January* 7 *Will.* 3. returnable the 10th of *April* following, that this *capias* was delivered to the defendant *Man*, and he by virtue thereof, before the return of the writ, viz. the 9th of *March* at *Launceston* aforesaid, at the request and instance of the defendant *Carpenter* took and arrested the plaintiff, and detained him in custody for want of sureties until the 10th of *March*, at which day the plaintiff paid the debt, which was the 3*l.* 16*s.* and 8*d.* &c. and the defendant *Man* then and there by consent of the defendant *Carpenter* let the plaintiff go at large; which is the residue of the said trespass, assault, and imprisonment, whereof the plaintiff complains; and they traverse *absque hoc* that they are guilty of any other trespass, assault, or imprisonment, before the *teste* of the writ, or after the return, or at *St. Ree*, or any other place out of the jurisdiction of the court of *Launceston*. The plaintiff replies, that the cause of action arose at *St. Neots*, *absque hoc* that it arose within the jurisdiction of the court of *Launceston*. The defendants demur. And *Lutwyche* and *Girdler* serjeants for the plaintiff argued, that the replication has avoided the defendant's plea; that the defendant by his demurrer has confessed, that the cause of action arose out of the jurisdiction of the court of *Launceston*, and then the officers who execute any process are punishable. *Contra*, if the court has jurisdiction, but the process is erroneous. And for this they cited 10 *Co.* 76. the case of the *Marshalsea*. 1 *Roll. Abr.* 547, 809. *March* 8. 2 *Rolle Rep.* 109. and *Mich.* 28 *Car.* 2. *C. B. Rot.* 516. *Higgen vers. Martin*. An action was brought as here against the plaintiff who recovered in the inferior court, and the officer for false imprisonment; the defendants justified as in this case; and the plaintiff replied, that the cause of action arose out of the jurisdiction of the court; and upon demurrer it was adjudged for the plaintiff upon the reason and authority of the case of the *Marshalsea*. So *Hil.* 33 & 34 *Car.* 2. *C. B. Rot.* 458. or 1629. *Gelder v. Pratt*, the same case and the same resolution. *Sed non allocatur*. For, *per curiam*, neither the officer nor the party are bound to take notice, whether the cause of action arise out of the jurisdiction of the court; and therefore the resolution of the case of the *Marshalsea* was a hard resolution, and warranted by none of the books there cited. But if the cause of action arose out of jurisdiction of the court, the defendant in the inferior

* Point.

Higgen v.
Martin.

Gelder v.
Pratt.

The officer
and party ex-
cused for exe-
cuting process
of an inferior
court, where
the cause of
action arose
out of the ju-
risdiction.

inferior court ought to plead it; and if he does not, the affair of the jurisdiction is over, and he shall not take advantage of it in any collateral action against the plaintiff, or the officer who executes the process. And so it was resolved in the Exchequer since the revolution, between *Poole* and *Gwinn*, upon solemn debate and examination of all the precedents, where the action of false imprisonment was brought against the judge, officer, and plaintiff in the inferior court; and the case was adjudged, when *Powell* justice was a baron of the Exchequer; and he said, that *Holt* chief justice approved of the judgment in the case of *Poole* and *Gwinn*, it being reported to him. 2. It was argued for the plaintiff, that notwithstanding his replication was not good, yet the defendants plea was ill; for the defendant justifies under a *capias teste* the 27th of January, and returnable the 10th of April following, and says, that by virtue thereof he took the plaintiff the 9th of March and discharged him the 10th, and traverses, *absque hoc* that they were guilty at any time before the *teste* and after the return of the writ; so that there is a time not traversed, in which the defendants may be guilty, notwithstanding any thing that appears to the contrary, viz. between the 10th of March, which was the day of the discharge of the plaintiff, and the tenth of April, which was the return day of the writ. And they cited *Carter* 84. *Atkins v. Cleaver*. And of this opinion was the whole court.

Roll Abr. 782. pl. 5.

Poole v. Gwinn.

2. Point.

Time not traversed.

Mich. 18. Car. 2.

A second exception was taken to the plea, that the plaintiff has declared of an express battery; therefore though the justification of the imprisonment impliedly justifies a battery; yet when an express battery is laid it ought to be justified also. 1 *Roll. Rep.* 176. *Wilson v. Dod*; and there it was adjudged a discontinuance, because there was no answer to the battery. But there is here an answer, such as it is, for the defendants say, *quoad totum residuum transgressionis*, &c. which the defendants intended to be a justification for the whole, and so to comprehend the battery, and therefore no discontinuance. But it is an insufficient justification, because they justify by implication only a battery which is included in the imprisonment, where an express battery ought to be justified. Besides, that if an officer has a legal process to arrest a man, yet he cannot beat him, unless he resists; but no such thing appears here, and therefore for this reason also the plea is ill. And so it was adjudged, *Pasch. 1691. C. B. intr. Hil. 2 Will. 3 Mar. Rot.* 759. *Stony v. Calvert*, and 2 *Vent.* 193. *Carre v. Donne*. And of this opinion was the whole court; for where an express battery is laid it is not enough to justify the imprisonment upon legal process, which includes a battery; but the defendant ought to go on, and shew that he arrested the plaintiff, and the plaintiff offered to rescue himself, and so the defendant was compelled to beat him.

3. Point.

Battery not justified.

An officer upon an arrest cannot beat a man without resistance.

Stony v. Calvert.

For

For otherwise if it be not upon some such occasion, a man cannot justify a battery in an arrest. And therefore for these two defects in the plea judgment was given by the whole court for the plaintiff.

Wainford *vers.* Barker.

If a man be cited in the spiritual court to account to another as administrator, where the other is no creditor, &c. a prohibition will be granted.

1 Salk. 154.

2 Vern. 141.

A creditor, who?

UPON motion for a prohibition to the spiritual court of Norwich (where the plaintiff was cited as administrator to J. S. to account, &c. at the instance and prosecution of the defendant) upon a suggestion, that the defendant was not a creditor, nor next of blood, to the intestate. The question was, whether the defendant, who had a debt due to him from the intestate by simple contract, but more than six years were elapsed, whether he should be accounted a creditor within the statute of 1 Jac. 2. cap. 17. to be enabled to compel the administrator to account. And adjudged, that he is a creditor within the act; for it is a debt, though barrable by pleading of the statute of limitations; and therefore the prohibition was denied.

Pechey *vers.* Harrison.

S. C. 1 Salk.

77.

Admittance of

a guardian

ought to be

upon record.

2 Barnes 326.

Judgment

for what ar-

restable?

THE plaintiff being an infant brought an action by guardian. And after verdict for him, it was moved in arrest of judgment, that there was no warrant for him to appear by guardian entred upon record. And it was resolved by the whole court, that the admittance of a guardian ought to be upon record, because it is the act of the court; for the court takes care of infants, that none shall sue for them, but those that are responsible; for if the infant be prejudiced he may have his action against him. But judgment cannot be arrested for this cause, no more than if no warrant of attorney be filed. But upon error brought, and diminution alleged and certified *in B. R.* it will be ill, for which the judgment may be reversed. But judgment can never be arrested, but for that which appears upon the record itself; but this admittance ought not to appear upon this record, but upon the remembrance of the prothonotary. In the same manner if a record begins, that *A. B. summonitus fuit*, which presupposes a writ; yet if there be no writ judgment cannot be arrested for this reason, but the party may have a writ of error. So in this case it is said upon the plea roll, that he appears *per guardianum suum ad hoc specialiter admissum per curiam*, which supposes that there is a regular admittance upon the prothonotary's remembrance; but if there is none, it is not examinable here. Therefore judgment was given for the plaintiff.

Harrison *vers.* Britton.

REplevin. The defendant makes confusance as bailiff to *J. S.* The plaintiff traverses, *absque hoc* that he is bailiff. The defendant demurs: And judgment for him. For the difference is between trespass and replevin. In the former such a traverse may be taken, but not in the latter.

Bailiff or not, traversable in trespass, contra in replevin. 3 Lev. 20. contra, and says, he ought to traverse in replevin.

Llewellyn *vers.* Pinock.

MOtion was made by serjeant *Geers* for a prohibition to be directed to the court of the bishop of *Llandaff*, where a libel was against the plaintiff for *Welsh* words, and no *Anglice* was laid in the libel; so that he urged, that the court could not understand them. But the motion was denied, for (*per curiam*) in *Wales* they understand the words, and therefore there is no need to lay an averment of the signification with an *Anglice*. But in an action brought for *Welsh* words in *England*, an averment of their signification ought to be laid.

For words not known to the judges, when it ought to be with an Anglice?

Sir William Duncombe *v.* Church, the warden of the Fleet.

SIR *William Duncombe* obtained judgment against *Church* for *Salk. 1.* 4000 *l.* for an escape, and upon affidavit made, that it is a just debt, it was moved that he might have a rule for sequestration of the office, according to the late act of parliament. And the question was, how this act shall be put in execution? And *per curiam*, a commission of sequestration ought to be granted to commissioners appointed by the court, under the seal of the court. And a commission was granted accordingly.

Sequestration of the office of warden of the Fleet.

Rosie *vers.* Hodges.

DEBT upon bond dated the 19th of *March* 1695. conditioned to perform the award of *A.* and *B.* of all actions, demands, &c. *ita quod* the award be made, and delivered in writing, before the first of *April* next following; and in case the arbitrators make no award within that time, then to perform the umpirage of *John Clerk*, *ita quod* he make his umpirage before the twelfth following. The defendant pleads, that the arbitrators made no award, but that

O o o

the

the umpire made an umpirage within the time limited; which recited, that whereas the defendant *Hodges* had lent to *Rosse* the plaintiff 30 *l.* for securing whereof the plaintiff *Rosse* had mortgaged certain lands to the defendant; and whereas there was a controversy between the plaintiff and defendant concerning that matter, he awarded that the plaintiff *Rosse* should pay to the defendant *Hodges* 35 *l.* before the of June next following, and that in the mean time he should permit the defendant to enjoy the possession of the mortgaged lands; and that upon payment of the said 35 *l.* to the defendant, the defendant *Hodges* should account to *Rosse* the plaintiff for the mean profits, and deliver over to him the mortgage deed, and re-assign to the plaintiff the mortgaged land; and then awards mutual releases until the day of the date of the bond: and the defendant pleads performance generally. The plaintiff replies, that he paid the 35 *l.* before the day appointed, but that the defendant has not re-assigned. The defendant rejoins, that he delivered the mortgage deed to the plaintiff, and was ready to re-assign, but the plaintiff had not requested him. The plaintiff demurs. And resolved, 1. That the rejoinder is without doubt a departure from the bar; for in the bar the defendant pleads general performance, and in the rejoinder he shews a special performance. See 2 *Keb.* 1 *Mod.* 3. pl. 612, 619. *intr. Trin.* 21 *Car.* 2. *B. R.* rot. 882. Then *Wright* ferjeant for the defendant took exception to the replication, that it is not said, that the plaintiff requested the defendant to re-assign. Now before request, this being an act to be done with the concurrence of both parties, the defendant has time during his life. *Co. Li.* 208. *b.* *Sed non allocatur.* For *per curiam*, the re-assignment might be made without the presence of both parties; for a deed delivered to the use of the party though absent will be good, and the interest will vest in him. But if it had been to re-infeoffe, it had been otherwise; because there the party must have been present to take the livery. Besides, that it is manifest, that the umpire intended that at the same time upon the receipt of the money the defendant should re-assign. And if it had been a fee, it might have been done by lease and release. Then *Wright* for the defendant said, that if any part of the award is void, and the non-performance of that is assigned for breach of the bond, the plaintiff cannot recover. Now here the non-reassignment is assigned for breach; but the award, as to that, is void for the uncertainty, for *non constat* by the award for how long time this re-assignment ought to have been, for years, life, or fee. Then this part of the award being void, the breach of it will signify nothing. *Sed non allocatur.* For *per curiam*, the word re-assignment imports, that it was but a chattel; but however it ought to be extended to the whole interest mortgaged. And therefore judgment was given for the plaintiff.

Departure.

1 *Mod.* 3. pl. 98.

Request,
where necessary?

Re-assignment,
what?

Blackett *vers.* Ansley.

THirty seven part-owners of a ship would send her a voyage, Admiralty. but two or three of the other part-owners would not con- *Ante* 223. sent. Upon which the admiralty took stipulation in nature of a *Post.* 1285. recognizance of the thirty seven for security for the safe bringing back of the ship. And the ship being lost, the two or three part-owners, who opposed the voyage, libelled upon this stipulation against the thirty seven. Upon which they moved for a prohibition. But it was denied; for *per curiam*, though by the law of *Littlet.* §. *England* two or three part-owners may hinder the others from send- 323. seems to the contrary. ing the ship a voyage without their consent, yet the law of the admiralty is otherwise. For there, for the encouragement of navigation, the court of admiralty will permit the ship to make the voyage, upon security given to bring her back safe. For it is reasonable that the others, who oppose the voyage, should have some security for their ship. Then if the ship be lost, it is at the peril of the adventurers, and they shall be suable upon their stipulation by the others in the admiralty; for now it is not doubted, but the admiralty may take stipulations.

John Thorpe *v.* Ric. Thorpe.

Intr. *Hil.* 8 *Will.* 3. C. B. Rot. 1667:

THE plaintiff brings *indebitatus assumpsit* against the defendant S. C. 1 Salk. for 7*l.* and declares, that whereas he had mortgaged to the 171. defendant certain copyhold lands, redeemable upon the payment of Lutw. 245. such a sum of money, the defendant, in consideration that the Release. plaintiff would release to the defendant his equity of redemption, Ro. Abr. 408. assumed to pay to the plaintiff 7*l.* the plaintiff avers, that he did Yelv. 193, 215, 156. release his equity of redemption; but that the defendant has not 3 Mod. 278. paid the 7*l.* The defendant pleads this release in bar of the action, because after the words [equity of redemption] the scrivener had added [and all actions, duties and demands.] The plaintiff demurs. And the question was, whether this 7*l.* was released by these general words? And *per curiam* adjudged, that this duty of the 7*l.* was not extinct. For where there are general words only in a re- Exposition of lease, they shall be taken most strongly against the releasor; as sentences. where a release is made to *A.* and *B.* of all actions, it releases all several actions which the releasor has against them, as well as all joint actions. So if an executor releases all actions, it will extend to all actions that he hath in both rights. 39 *Edw.* 3. 26. *b.* 2 *Ro.* *Abr.*

Knight
v. Cole,
3 Mod. 277.

Abr. 409. *A.* 1. But where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the special words. 2 *Saund.* 403. 3 *Keb.* 45, 59. *Lord Arlington v. Merrick.* 1 *And.* 64. *Moor* 133. By *Anderson.* And *Powell* justice cited a case between *Knight* and *Cole*, adjudged *Trin.* 2 *Will. & Mar. B. R.* in which case he was council. The case was thus: *A.* recovered against *B.* a judgment for 6000*l.* and made *J. S.* and *J. D.* his executors, and died; *B.* made *C.* his executor, and devised a legacy of 5*l.* to *J. D.* and died; *J. D.* by deed acknowledged the receipt of the 5*l.* of *C.* and thereby released the said legacy, and all actions, suits and demands, which he had against *C.* as executor to *B.* and after argument *in B. R.* it was adjudged, that nothing was released but the 5*l.* And therefore in the principal case judgment was given for the plaintiff. See 2 *Cro.* 623. *Porter v. Philips.* *Post.* 662.

Osborn *vers.* Poole.

S. C. Lutw.
1053.
Words of a
parson, *viz.*
He is a pitiful
pimping rascal.
4 Rep. 19.
Cro. Jac. 65,
66. pl. 5.
2 Bull. 138.
Lat. 47.
Sid. 373, 393.
12 Mod. 104.
Vent. 2.
2 Inst. 493.
2 Lev. 49.
3 Heb. 28.

Adjective
words.

MOtion was made last *Easter* term for a prohibition to be directed to the spiritual court of *Coventry*, where a libel was preferred against the plaintiff, being a parson, for these words; *Poole* is a pitiful pimping rascal, *et alia verba turpissima.* And a rule was made, that the other side should shew cause why a prohibition should not be granted. And now the last day of this term, upon motion to grant the prohibition absolutely, the court held, that nothing should be more defamatory of a parson than of a layman, unless it concerned his spiritual function, and imported some crime punishable in the spiritual court. Therefore knave or rogue is not punishable there; but if it is said, that he is a knave in his preaching (the speaking being of a parson) no prohibition shall be granted, because it defames him in his function. 2 *Roll.* 295, 7. But the word pimp is punishable there, whether it be spoken of a clergyman or a layman; for the crime which it imports, is punishable there. *Godb.* 66. Then if the party makes use of an adjective word, the difference is, where the adjective word imports an act done or a habit, and where it imports only an inclination; as to say, that *J. S.* is a bribing attorney, or murdering villain, or pimping rascal, these import an act done, and are punishable at common law, or punishable in the spiritual court, being taken distributively. But to say, that *J. S.* is a murderous villain, or pimpery rascal; the law is otherwise, because these import only an inclination. And of this opinion was the whole court. But then *Treby* chief justice said, that the question would be, in what sense the court would understand these words, for the pronunciation of the words added much to their signification; then it may be

be that the words were spoken in jest, &c. and for this reason he inclined to grant a prohibition. But the other justices said, that they could not intend any such thing, and therefore they opposed the granting the prohibition; and if the plaintiff had any thing to excuse himself, he might plead it in the spiritual court, and if they refused to admit it, then a prohibition should be granted. But in the mean while the prohibition was denied as to the words pimping rascal; and a prohibition was granted as to the other uncertain words, *alia verba turpissima*.

Lambert *vers.* Cook.

T Respafs for the taking of cattle at *D. parvum praediſt.* &c. ^{20 Viner, Tit. 114 to 119.}
 The defendant juſtifies, that J. S. was ſeiſed in fee of ^{Surpluſage,} *Blackacre*, and being ſo ſeiſed demised it to the defendant for three years to commence from *Lady-day* 8 Will. 3. that the defendant by virtue thereof entred, and took the cattle there *damage feaſant*, &c. The plaintiff replies, that before the demise made to the defendant J. S. demised this *Blackacre* to him, to hold *de anno in annum quamdiu ambabus partibus placuerit*, and that he entred and put in his cattle, and that the defendant took them within the two years; *absque hoc*, that J. S. demised to the defendant *modo et forma*, &c. The defendant demurs, and shews for cause, that the plaintiff *non traversat* the last lease, &c. And Lovell serjeant for the defendant argued, that the declaration was ill, because it is for taking of cattle at *D. parvum praediſt.* where no mention is made of *D. parvum* before; and therefore it is a declaration of a trespass in no place. But the court said, that they would have no regard to this exception, for they would reject the *praediſt.* as ^{Praediſt re-} surplusage. Then Lovell took exception to the replication, that ^{jected as sur-} it was ill by reason of the traverse of the last lease of the defendant, for the plaintiff had sufficiently avoided it before; for leases for years being by grant, where two several persons derive two several leases from the same person, he who has the prior lease shall not traverse the subsequent lease, but the subsequent shall traverse the former. But in feoffments the law is otherwise, for there the last feoffment must be confessed and avoided; because a disseisor may gain a fee, but none can gain an estate for years but by lawful conveyance. And such traverse is ill upon a general demurrer. 6 Co. 24. b. *Helier's case*. Ow. 141, 2. *Yelv.* 221. Hob. 80. 1 Cro. 586. *Moor* 557. See 1 *Brownl.* 147. 2 *Saund.* 28. And 1 Cro. 494. only 3 Cro. 754. *Covert's case*, is to the contrary, which cannot oppose the current of so many books. 2. Admit that it is good upon a general demurrer, yet in this case the defendant has demurred specially, and shewn this for cause; and therefore without

doubt it is ill, for it is at least matter of form, whereof the defendant shall take advantage by his special demurrer. Against this it was argued by serjeant *Wright* for the plaintiff, 1. That the defendant's demurrer is general and not special, for it shews for cause that the plaintiff has not traversed, &c. where in fact he has traversed; so that the cause shewn is repugnant to and confuted by the very record. Then there not being any cause shewn, it shall be a general demurrer. Then if this traverse is but matter of form, it will be aided by the general demurrer. And for authority in this point, that it is but form, he relied upon 2 *Ventr.* 212. *Denny v. Mazey*. The first case of this nature was 26 *Hen.* 8. 4. pl. 16. whereof *Hobart* 102. takes notice. Then comes *Helier's* case, 6 *Co.* 24, 25. which seems to be the foundation of all the latter judgments. And *Moor* in reporting this case seems to insinuate, that the judgment was given for another reason than that which *Coke* mentions. But yet admitting *Helier's* case to be law, it does not appear, that it was upon a special demurrer, for the record cannot be found. 2. This case differs from *Helier's* case, for there the plaintiff and defendant claimed the same interest, and there cannot be two assignments of one term for years; but here there might be two leases, for it might be, that *J. S.* after he had leased to the plaintiff, entred upon him, and ousted him, and leased to the defendant; so that there is here a possibility of two leases such as they are; but there cannot be two assignments of one term. The want of a traverse is aided by a general demurrer, 1 *Cro.* 323. much more where there is a traverse too much.

Traverse.
Dier 355.
Ante 64.

Jenk. 105.

Special demurrer, what?

2 *Ventr.* 212.

But after several arguments at the bar the court was of opinion, that *Helier's* case was good law upon a general demurrer; for where a traverse is taken of a matter not alleged, it is but form; but where the plea is fully confessed and avoided, and then a traverse moreover is taken, this traverse vitiates the whole plea. *Bro. Confess and avoid* 65. 33 *Hen.* 6. 28. Then here when the first termor (admitting that the lessor had ousted him and made a subsequent lease) re-enters, the second lease is become void. Then to traverse the second lease is to traverse a void lease, which would be ill upon a general demurrer. But the court resolved, that this demurrer was a special demurrer; for as to the [non] since it is contrary to the record, they said they would reject it as surpluage. And therefore judgment was given for the defendant. Note, the court said, that the case of *Denny v. Mazey* was a blind case.

Fontleroy vers. Aylmer.

Trespass *quare clausum suum fregit et intravit et viginti per-* Trespass with
ticas sepium suarum prostravit et berbam suam cum ave- *continuando.*
riis consumpsit et conculcavit et quare in separali sua piscaria pis- Ro. Abr. 549.
catus fuit et pisces cepit, with a *continuando* as to the *prostration* *Quare pisces*
of the fences and consuming of the grass for two years. Not *cepit, without*
guilty pleaded. Verdict for the plaintiff. Serjeant Rotherham *saying suos.*
moved in arrest of judgment, 1. That the plaintiff has brought his Bro. Trespass,
action for fishing in his several fishery and taking of the fish; but 149.
he has not said *pisces suos*; so that the plaintiff has not intituled Vent. 278.
himself to the action, for he has not laid any property of the fish 2 Lev. 156.
in him. And therefore in the case of *Holland* in the time of lord 3 Keb. 524.
Hale trespass was brought, *quare clausum suum fregit et avenas* Holland's
cepit, and the plaintiff did not say *suas avenas*, and after verdict case.
for the plaintiff this was moved in arrest of judgment, and *Hale*
chief justice then said, that if it had been a new point, he would
not have arrested judgment for this cause; for since the plaintiff
has said, that it was his close, the corn there should be intended
prima facie his corn; but he said that there were so many pre-
cedents to the contrary, that because he would not over-rule them,
he arrested the judgment for this cause. But the court seemed to
incline strongly, that this exception was not very considerable, for
the reasons that *Hale* chief justice gave against his own judgment
in *Holland's* case. Then serjeant *Rotherham* took another excep-
tion to the declaration, that the plaintiff had laid the overthrowing
of the fences with a *continuando* for two years, which is ill, for
every prostration is a transient act, and the fact of every day
was a new distinct trespass. And therefore 31 Car. 2. B. R. *Ovell* T. Jones 109.
v. Langden, trespass for taking of oysters with a *continuando* from Ovell v.
such a day to such a day, and after verdict for the plaintiff judg- Langden.
ment was arrested because this *continuando* was ill, for the taking
of every day was a new trespass. Then in this principal case, the
damages being intire, so that damages are given as well for the
trespass which is ill laid, as for those which are well laid, judg-
ment ought to be arrested. Against which it was argued by the
plaintiff's council, that since it is after verdict, the damages shall
be intended to be given only for the trespasses which might be laid
with a *continuando*, and not for those which could not be laid
with a *continuando*. But *Powell* justice answered, that the dif- Damages, for
ference was, that where several trespasses are laid in one declara- what given?
tion, *continuando transgressionem praedictam*, and some of the
trespasses may be laid with a *continuando*, and some not, after
verdict the *continuando* shall be extended only to the trespasses
which

1 Sid. 379.

which may be laid with a *continuando*, and not to those which cannot be laid with a *continuando*. But if any trespass is laid specially with a *continuando*, which ought not to be laid with a *continuando*, though there are other trespasses in the declaration, which might be put with a *continuando*, if the damages are intire, judgment shall be arrested for the whole; because the declaration cannot be aided by extending the *continuando* to the trespasses only which might be laid with a *continuando*, for the plaintiff has confined the *continuando* to that particular trespass, which could not be laid with a *continuando*. Therefore in this principal case the declaration cannot be aided by any such intendment.

Trespass with
continuando.

But after several arguments, at another day the court resolved,
1. That where the trespass may be laid with a *continuando*, depends much upon the consideration of good sense; therefore where trespass is brought for breaking of a house or hedge, this may well be laid with a *continuando*, for the pulling away of every brick is a breach, which may be done one one day and another other, so one stick may be pulled out of a hedge one day and another another; but trespass cannot be laid with *continuando* the prostration of a house, for when the house is once thrown down it cannot be thrown down again. The same law of the throwing down of a hedge, *per Treby and Nevill*. But *Powell* justice was of opinion, that a man may bring trespass for throwing down of a house with a *continuando*, because one part may be thrown down at one day, and another at another. The same law of a hedge. But he said that here the declaration is, that the defendant threw down twenty perches of the hedges, *continuando*, &c. which must be intended of a prostration done at the first day, and therefore the *continuando* afterwards is ill.

Evidence at
divers days.

2. Resolved that trespass cannot be laid of loose chattles with a *continuando*, as a hundred load of wheat with a *continuando* from such a day to such a day. And therefore *per Powell* justice, no evidence can be given, but of the taking at one day; and therefore (by him) though it is the practice in trespass for the mean profits, to lay a trespass at one day, and give damages in evidence done at several days; that is not law, and ought not to be allowed: but in such case it ought to be laid *diversis diebus et vicibus*, and then several trespasses may be given in evidence. See 2 Roll. Abr. 549. *Hoskins v. Jennings*. 2 Keb. 407. *Pain v. Brown*. 1 Sid. 319. *Butler v. Hodges*.

Aided by ver-
dict.

3. Resolved, that though in this principal case this *continuando* had been ill upon a demurrer, or judgment by default; yet it is aided by the verdict; for they will intend, that the jury gave no damages

damages for this *continuando*. And Treby chief justice said, that this was in nature of a *bis petitum*, but that is aided by a verdict, but ill *Bis petitum*. upon a demurrer. Therefore judgment for the plaintiff by the whole court.

Holdroid *vers.* Liddel.

DEBT for 20*l.* against the defendant for escape. The plain-
tiff declares, that he recovered a judgment in against
Clerk, and sued a writ of execution, viz. a *capias ad satisfaciendum*, directed to the defendant sheriff of Essex, to take Clerk, which was delivered to the defendant, and that the defendant took him in execution the 16th of July, and let him escape the 25th of July at London in Cheapside. The defendant pleads, that before the 25th of July, viz. the 17th, a *habeas corpus* issued out of the common pleas, to bring the body of Clerk to the common pleas *ad tres Michaelis* next following, that this writ was delivered to him, and that he by virtue thereof brought Clerk the 18th of July from Chelmsford by London the shortest way, and at *tres Michaelis* delivered him at the common bench, to be committed in execution. The plaintiff *protestando* that the defendant did not bring Clerk by London, said that the *habeas corpus* was delivered to him the first of October and not before. The defendant rejoins, that the *habeas corpus* was delivered to him before the first of October. And the plaintiff demurs. And adjudged for him for an apparent fault in the rejoinder, because the defendant ought to have said, that the writ of *habeas corpus* was delivered to him, before he brought Clerk out of prison; for it signifies nothing to say, that it was delivered before the first of October, because that appears to be subsequent to the time of the escape. But per Powell justice, the matter of law is with the plaintiff; for if a *habeas corpus* is delivered to the sheriff in July, to bring a man in execution to the common pleas next *Michaelmas* term, the sheriff may take a reasonable time, of which the court will judge according to the circumstances; but he cannot bring him out of prison, and keep him out of prison all the vacation. But Treby chief justice said that he would not determine that point. And therefore for another reason judgment was given for the plaintiff. See *Hob. 202. Balden v. Temple*.

Escape.
Cro. Car. 14.
466.
Mo. 299.
3 Rep. 43.
Noy 38.
Hard. 476.
1 Mod. 116.

Habeas corpus.

Norton *vers.* Brigs.

Intr. Trin. 8 Will. 3. C. B. Rot. 1303.

Modus decimandi.

2 Lutw. 1043, 1052.

1 Ro. Abr.

(Q) 640. Pl. 11.

Mo. 910.

Cro. El. 660.

Cro. Ja. 42.

Yelv. 86.

Tithes of one thing cannot be a discharge of tithes of another.

Modus, where void in the whole?

A Prohibition was granted to a suit for tithes of cows, calves, herbage, and pasture, upon suggestion of a custom, that every parishioner from time whereof, &c. had used to pay for every cow having a calf 1 *d.* for every cow not having a calf 1 $\frac{1}{2}$ *d.* as for as five cows, and for five cows 1 *s.* and 3 *d.* and for six cows 2 *s.* 6 *d.* and for ten cows 2 *s.* 8 *d.* *in plena satisfactione omnium decimarum vaccarum et vitulorum, et herbagii, et pasturae.* The plaintiff declared in attachment upon this prohibition, and upon traverse of the custom a verdict was found for the plaintiff in the prohibition. Upon which *Lutwyche* serjeant moved in arrest of judgment in *Easter* term last past, 1. That this custom was void, for it is laid to be a discharge of tithes of all cows, which is not, for nothing is laid for the tithe of the seventh, eighth, and ninth cows, and payment for the sixth cannot be payment for the seventh, &c. 2. This cannot be a discharge of the tithes of herbage and agistment, for tithes of one thing cannot be a discharge of tithes of another, and tithes are payable of both; then since the custom is laid intire it is void in the whole. 3 *Cro.* 446, 475. And of this opinion was the whole court, and therefore judgment was arrested and a consultation granted, unless cause should be shewn this *Trinity* term. At which time serjeant *Levinz* moved, that the prohibition should stand, because it appears here that there is a custom, and then the spiritual court has no jurisdiction to proceed; and therefore variance in case of a *modus* will not hurt, but the prohibition shall stand, because it appears, that the spiritual court has not jurisdiction; and when they have not jurisdiction the Common Pleas cannot allow them to proceed. *Sed non allocatur.* For *per curiam* the question is here, whether the *modus* be good or void. If the *modus* is void the spiritual court has jurisdiction, and the *modus* is void for the reasons given before. Then *Levinz* moved, that though the custom was void for part, yet it was good for one, two, three, four, and five cows, and therefore he prayed, that the consultation should be granted only for that part which is void, and that the prohibition should stand for the residue. And by this he said, that a man might have a *modus* for five cows, and then for the residue he shall pay tithes *in specie.* And the court agreed the case put by him, but said, that in the principal case the custom was intire for all cows, and therefore if it was ill in part it was ill in the whole; and a consultation was granted as to all. In this case *Treby* chief justice said, that tithes are not payable for after

aftermowth *de jure*, and therefore it is but form to lay a custom to be discharged of tithes of aftermowth in consideration of making the former mowing into hay, for tithes are payable only of things *semel in anno renovantibus*. See *contra* 1 Roll. Abr. 640. pl. 11. Parson of Stanfield's case.

Moor *vers.* Risdell.

[Ndebitatus assumpsit. The defendant pleads in abatement that the plaintiff is a popish recusant convict, *prout patet per recordum* of the estreat of the Exchequer. The plaintiff demurrs. And the first exception was, that in pleading the conviction the defendant says, that a proclamation issued to summon the plaintiff to appear and render himself before or at the next sessions; and then 3 Lev. 3331 says, that the plaintiff did not render himself at the next sessions; but he does not say, that he did not render himself before. And *per curiam*, for this reason the plea is ill. 2 Exc. The defendant does not produce in court the record of the conviction, but only an exemplification of the estreat in the Exchequer. And *per curiam*, that is ill also, for the estreat in the Exchequer is not a record, but only minutes, to make process upon it for the King, and therefore *respond. oustre* was awarded.

Averment;
Estreat of the
Exchequer is
not a record.
See Bunb.
Rep. 24, 25;

Trin.

Trin. Term

9 Will. 3. B. R. 1697.

Sir John Holt Chief Justice.

Sir Thomas Rokeby

Sir John Turton

Sir Samuel Eyre

} Justices.

Penoyer vers. Brace.

S. C. Comb.
441.

S. C. 1. Salk.
319.

5 Mod. 338.

Carth. 404.

3 Danv. Abr.

332. p. 6.

Show. 405.

Error abated

by death.

Execution

sued.

Thel. Dig.

179. lib. 12.

cap. 1. f. 16.

Yelv. 112,

208.

8 Mod. 108.

Error abated.

12 Mod. 130.

TRESPASS was sued against five. And upon not guilty pleaded, verdict for the plaintiff, and judgment against all. Upon which the five defendants sue a writ of error upon this judgment for error in fact; and before the record is certified, one of the plaintiffs in error dies. Upon which the plaintiff in the original action sues out execution against all, &c. It was admitted by the court, 1. That the writ of error was abated by the death of this plaintiff. 2. It was agreed by the court, that if execution had been sued against four defendants, omitting the fifth, that this had been erroneous, because it varies from the judgment which does not warrant it. 3. It was agreed by the court, that if the execution could be *teste* the day of the judgment (as it might if the plaintiff had not been delayed by the writ of error) and had been sued against all five, that this execution had been good, because the death of the defendant was subsequent to the *teste* of the writ of execution. 4. The court took this difference, if there are several plaintiffs in one writ of error, the death of one abates the writ, because there cannot be any judgment according to the writ; but if there are several defendants in error, and one dies, it is otherwise, for they are not named in the writ. But the great question was, whether the plaintiff in the original action could immediately sue execution upon this abatement of the writ of error, without suing a *scire facias*. And Mr. Northey argued,

argued, that the alteration of the court will never make an alteration of the process; as if a judgment of the Common Pleas be affirmed in the King's Bench upon error within the year, the parties may sue out execution without a *scire facias*. But where there is an alteration in the parties, as in this case, there there must be a *scire facias*, because there may also be an alteration in the cause, and the survivor by possibility may have a release, or some other new matter to plead against the execution. 2 Inst. 471.

Mr. Eyre *e contra* argued, that though there was here an alteration of the parties, yet the execution was the same, for it will not charge any person who was not party to the judgment. The executor to the party deceased was not liable. If he had been liable, then a new person had been become party to the execution, and therefore a *scire facias* had been requisite to make him privy to the judgment. And he took this difference, where a new person shall take benefit by, or become chargeable to, the execution of a judgment, who was not party to the judgment, there a *scire facias* ought to be sued against him, to make him party to the judgment, as in the case of executors and administrators. But where the execution of a judgment is not chargeable or beneficial to a person who was not party to the judgment, there it is otherwise, as where there is a survivorship. And for this he relied upon 21 Hen. 7. 16. Moor 367. Ifam's case. Noy 150. Carter 112, 193. As to the objection of a possibility, that the survivor may have released, that is of no force; for admitting that the other defendant was alive, that would as well prove, that no execution could be sued against the other four without a *scire facias*. But the law without doubt is otherwise, for if the other four had a release to plead living the fifth, yet execution might be sued against them all within the year notwithstanding that; and if one of them dies, that will not make an alteration of the law; for no reason can be given why the death of one should put the survivors in a better condition than they were before his death. And Holt at another day delivered the opinion of the court, that there is no need to sue a *scire facias*, because there was not any alteration of the record, nor any new person made liable to the execution. But it was adjudged, that the execution sued upon the death of the plaintiff in error was erroneous, because the court was superseded by the writ of error; and this *superfedeas* continues until the court be apprised of the abatement of the writ of error by the death of the party, for they ought either to certify the writ of error, or a matter of excuse, which they cannot return, unless they are themselves before certified of the death of the party, which may be by some suggestion or entry upon the record, &c. Therefore a *superfedeas quia improvide* was awarded, because the execution was sued upon

upon the death of the plaintiff in error, before it appeared to the court.

Bacon vers. Dubarry.

S. C. Skin.
679.
Salk. 70, 787.
Carth. 412.
S. C. 12 Mod.
129.
S. C. Comb.
439.

IN debt upon bond for 600 l. the defendant prayed *oyer* of the condition, which was, that whereas there were divers controversies between the plaintiff and defendant as attorney to *Derutter*, that the defendant should perform the award of J. S. their arbitrator concerning the said differences. The defendant pleads no award made, &c. The plaintiff replies, and shews the award, by which it was awarded, that the defendant should pay to the plaintiff 345 l. and that the plaintiff and defendant should give mutual releases, viz. *Bacon* should sign a release to the use of *Dubarry*, and *Dubarry* sign a release to *Bacon*; and then the plaintiff assigns a breach in the performance of this award by the defendant. The defendant demurs. It was resolved by the whole court after several arguments *Hilary* term last past,

Submission to arbitration on behalf of another.

1 Roll. Abr.
244. pl. 18.

1. That *Dubarry* was bound by this submission, though it was not on behalf of himself, but as attorney to another; that *Derutter* himself was not bound, because he was a stranger to the submission, but *Dubarry* who submitted is bound, because he took it upon himself, and has bound himself by the bond to the performance of it.

Award of one part.

2. It was resolved, that this award was of one side only, and consequently ill; for the defendant's submission is on behalf of *Derutter*, and nothing is awarded to *Derutter*, for he has no advantage by this award, because the release is awarded to be made to *Dubarry* to the use of *Dubarry*, so that *Derutter* has no benefit by it. But *per curiam* it had been otherwise if the award had been, that the plaintiff should release to *Derutter*, or to the defendant for the use of *Derutter*, or to the defendant *Dubarry* generally, without saying to the use of *Dubarry*; for then it might have been intended to the use of *Derutter*, because the submission was in behalf of *Derutter*; or as *Shower* argued, because it had been a good discharge in equity.

Uncertainty in award.

3. It was resolved, that this award could not be good without the releases, in respect of the money which the arbitrator had awarded to be paid by *Dubarry* to the plaintiff, because it does not appear for what cause the defendant ought to pay that money. The arbitrator does not say, that having found 345 l. due from *Derutter* to the plaintiff, his award is, that *Dubarry* should pay the

the 345^l. It is not said, that he awards the payment of this 345^l. in satisfaction of all accounts, or for all the money due from *Derutter*, or that *de et super praemissis* he awards it. If any such thing had been, this award had been good without the releases, because the payment of the money had been a good discharge of itself. But as it is, the award is void, because it cannot be a discharge, for the uncertainty. See 2 *Roll. Rep.* 1. *Stile* 44. 1 *Roll. Abr.* 254, 5.

4. It was resolved, that though this award in pleading is alleged to be made *de et super praemissis*; that is of no avail, because the award itself does not justify any such averment, not being made *de praemissis*, as it is pleaded. And that which in itself is a void award, cannot be made good by the allegation of the parties. Judgment was given for the defendant. Mr. *Salkeld*.

Freeman *vers.* Bernard.

Assumpsit upon an agreement for the delivery of a certain quantity of hops, &c. The defendant pleads, that the plaintiff and he had submitted this matter to the arbitration of *J. S. ita quod* the award should be made, and ready to be delivered, by such a day, &c. and the defendant shews, that *J. S.* made an award before the day, that the defendant, or his executors or administrators should give a general release to the plaintiff, and that the plaintiff should give a general release to the defendant; and the defendant pleads, that he was always ready, and yet is, to sign and seal a release. The plaintiff demurs. And divers exceptions were taken to this award. 1. That the submission is *ita quod* the award be ready to be delivered by such a day, and the defendant has not averred, that it was ready to be delivered by the day. *Sed non allocatur*. For *per Holt* chief justice it has been often held in this court, that if the award be made by the day, it is ready to be delivered, and so it appears, and therefore there is no need to aver that it was ready. See *Cro. Car.* 541. *Bradsey vers. Clyston accord*. 2. Exc. That the award is void for the uncertainty, viz. that he or his executors or administrators, &c. so that time is left to him to perform it during his life, or he may leave it to his executors. And election given in an award is ill, 1 *Roll. Rep.* 271. But to this exception Mr. *How* for the defendant argued, that the court will reject the words [or his executors or administrators] because as to them (he said) the award was void, for the executor or administrator is out of the submission, and the power of the arbitrator determines with the life of the person submitting, and so cannot extend to the executor or administrator. Debt upon award does

S. C. 1 *Salk.*
69.
Carth. 378.
Lutw. 524.
3 *Mod.* 331.
March 18.
Jo. 431.
Cro. Car. 541.

1. Exc.
Ready to be
delivered.

2. Exc.

does not lie against an executor or administrator. 3 Cro. 557, 600. But *Holt* chief justice said, that the executors are bound by the submission of their testator, but the addition of them in this award is but cautionary, and therefore will not vitiate. 3. The third exception was, that the plea is ill, because the defendant has not averred performance of this award, and the plaintiff has no remedy, to compel him to perform it. *Sed non allocatur*. For *per Holt* chief justice, heretofore if the award was, that the party should do any collateral act, it was held, that the party could not plead this before performance; *contra* if the award appointed the payment of money. And the reason was, because the party had no remedy in the former case to compel performance, but otherwise in the latter case. But that reason fails now, for now *assumpsit* lies upon the mutual promises; and no *assumpsit* was allowed formerly upon mutual promises; but heretofore if the submission was by bond, the award might have been pleaded before performance, because the party might have had remedy to compel performance. And *Holt* chief justice said, that he had known a rule of court to submit to an award to be given in evidence upon *assumpsit*. But judgment was given by the whole court for the plaintiff; for the arbitrator has awarded nothing in satisfaction, but only has ordered means to discharge the action. He has not awarded a horse or money in satisfaction, but only mutual releases. Where an award creates a new duty instead of that which was in controversy, the party has remedy for it upon the award; and therefore if the party resorts to demand that which was referred and submitted, the arbitrement is a good bar against such action. *Contra* where the award does not create a new duty, but only extinguishes the old duty by a release of the action. Mr. *Salkeld*.

Prince *vers*. Moulton.

S. C. 12 Mod. 131. Comb. 442. S. C. 2 Salk. 663. Carth. 386. Damages by *per quod*. 3 Lev. 246. CASE. The plaintiff declares, that he the second of July was possessed of a meadow, near which there was a river, which run to an ancient mill; that the defendant the third of August built a new mill, and thereby raised the water, and drowned the meadow; *per quod* he lost the profits and use of the meadow from the second of July *usque diem exhibitionis billae*. Not guilty pleaded. Verdict for the plaintiff. And after divers motions judgment was arrested; because the erection of the mill not being till the third of August, and damages being given upon the *per quod* from the second of July, damages were given for longer time than the plaintiff had been damnified, and therefore it is ill, for he could not by this lose the use of the meadow between the second of July and the third of August. Hob. 189. *Harbin v. Green*.

Green in point. But *per Holt* chief justice, if it had been only that he lost the profits, without saying the use, it might have been good, because it might be, that the plaintiff permitted his meadow to lie fresh for mowing from the second of *July*, and so the water destroying it by overflowing, he lost all the profits of it. Judgment was arrested.

Benson vers. Derby.

THE defendant being an attorney, and sued by the name of *Thomas Derby*, puts in bail by that name, and afterwards pleads in abatement, that his name is *John Derby*. And it was moved, that this plea might be rejected, because is is contrary to what he hath admitted by putting in of bail by the name of *Thomas Derby*. But *per Holt* chief justice, the putting in of bail is the act of the bail, and therefore will not estop the defendant. And therefore the motion was denied. See *1 Ventris* 154. *Sir William Hicks contra.* The putting in of bail does not estop the defendant. *2 Keb. 824.*

Mich. Term

9 Will. 3. B. R. 1697.

Sir John Holt *Chief Justice.*

Sir Thomas Rokeby

Sir John Turton

Sir Samuel Eyre

} *Justices.*

Memorandum, *this term Mr. serjeant Hatsel was made baron of the Exchequer in the room of Sir John Blencowe removed into the Common Pleas.*

Sutton *vers.* Moody.

S. C. Comyns

34.

S. C. 2 Salk.

556.

J. C. 5 Mod. 375.

Property.

J. C. Comb. 458.

6 Mod. 183.

7 Co. Case of
swans.

TRESPASS *quare clausum suum fregit et centum cuniculos suos adtunc et ibidem inventos venatus fuit occidit cepit et asportavit.* Upon not guilty pleaded, verdict for the plaintiff and intire damages. Gould serjeant moved in arrest of judgment, that conies are *ferae natura*, and therefore there is no property in them in any; therefore since the plaintiff has laid property in them by the word [*suos*] it is ill, and no damages ought to have been given for them. But if the action had been for having hunted in *warennæ suæ*, and killed *cuniculos suos* there found, it had been good, for then he would have had a privileged property in them. The same law for fish taken in *separati piscaria*. *Fitzh. N. Br. 87. 1 Cro. 553. Greenbill v. Child. March 48. Jones 440.* But generally there is no property in things which are *ferae natura*, and therefore *trover* does not lie for a hawk, without alleging that he was reclaimed; and in such an action it was adjudged against the plaintiff, though it was alleged in the declaration, that he was possessed of the hawk as of his

his proper goods. *Dier* 306. b. pl. 66. *Sed non allocatur.* For per *Holt* chief justice, a warren is a privilege, to use his land to such a purpose; and a man may have warren in his own land, and he may alien the land, and retain the privilege of warren. But this gives no greater property in the conies to the warrener, for the property arises to the party from the possession; and therefore if a man keeps conies in his close (as he may) he has a possessory property in them, so long as they abide there; but if they run into the land of his neighbour, he may kill them, for then he has the possessory property. If *A.* starts a hare in the ground of *B.* and hunts it, and kills it there, the property continues all the while in *B.* But if *A.* starts a hare in the ground of *B.* and hunts it into the ground of *C.* and kills it there, the property is in *A.* the hunter; but *A.* is liable to an action of trespass for hunting in the grounds as well of *B.* as of *C.* But if *A.* starts a hare, &c. in a forest or warren of *B.* and hunts it into the ground of *C.* and there kills it, the property remains all the while in *B.* the proprietor of the warren, because the privilege continues. And these distinctions *Holt* chief justice took upon the authority of 12 *Hen.* 8. 9. And by the whole court judgment was given for the plaintiff, because he had a property by the possession. And *Holt* cited 1 *Vent.* 122. *Pollexfen v. Ashford*, as a case in point, where it is said, that it would be good upon a demurrer. See *Reg.* 93. b. *Brownl. decl.* 167. *Rast. entr.* 450. b. *Thelol.* dig. 196. 22 *Hen.* 6. 59. b. And *Holt* said, that the reason of the case in *Dier* 306. b. was, that he admitted himself out of possession, and therefore the action could not lie, unless the hawk was reclaimed.

Hunting.
Godb. 123.
12 Mod. 145.
11 Mod. 75.
Holt. Rep.
16.

the case of pheasants
T. Raym. 16.

Smallcomb *vers.* Cross and Buckingham, &c. sheriffs of London.

IN *trover* for goods, upon the general issue pleaded, at the trial at S. C. 1 *Salk.* nisi prius in London at Guildhall, before *Holt* chief justice, the fact appeared to be thus: *J. S.* recovered judgment in debt against *Fox*, and *J. N.* recovered another judgment against *Fox*. *J. S.* sued a *fieri facias* upon his judgment, which was delivered to the sheriffs of London at nine of clock in the morning, but he would not take a warrant of the sheriffs to levy the goods, but procured the writ to be indorsed according to the statute of 29 *Car.* 2. cap. 3. *J. N.* sued another *fieri facias*, which bore *teste* before the *fieri facias* of *J. S.* but was delivered to the sheriffs subsequent to the *fieri facias* of *J. S.* viz. at ten of clock in the morning, but both the writs were delivered the same day. *J. N.* took a warrant from the sheriffs, and levied the goods in execution, which the sheriffs sold to the plaintiff *Smallcomb*. Afterwards the sheriffs seized the goods

320.
5 Mod 376.
Carth. 419.
3 Danv. Abr.
319 p. 9, 11.
1 Mod. 188.
6 Mod. 292.
12 Mod. 126.

Two execu-
tions.

Cro. El. 174,
181.

Action against
the sheriff.

A man be-
comes bank-
rupt after a
writ of exe-
cution deli-
vered to the
sheriff against
him.

3 Lev. 69, 191. Philips v. Thomson. See 2 Ventr. 218.

goods in execution upon the *fieri facias* of J. S. and sold them to the defendant *Cross*. And now *Smallcomb* brought *trover* against *Cross* and the sheriffs of London; and this matter appearing upon the evidence, *Holt* chief justice doubting of it, appointed that it should be moved in court. And after argument on both sides it was resolved by all the judges, 1. That if two writs of execution are delivered to the sheriff the same day, he has not an election, to execute which he pleases, but he must execute that which was first delivered. But if the sheriff levies goods in execution by virtue of the writ last delivered, and makes sale of them (whether the last writ was delivered upon the same day or a subsequent day) the property of the goods is bound by the sale, and the party cannot seize them by virtue of his execution first delivered; but he may have his remedy against the sheriff. For sales made by the sheriff ought not to be defeated, for if they are, no man will buy goods levied upon a writ of execution. And at common law if a *fieri facias* had been sued the first day of the term, and another *fieri facias* afterwards, and the last had been first executed, the other had had no remedy but against the sheriff. But in this case no action lies against the sheriff, because he who delivered his first writ would not take a warrant from the sheriffs to levy the goods; so that it seems he had a design only to keep that execution in his pocket, to protect the defendant's goods by fraud. And judgment for the plaintiff by the whole court. And *per Holt* chief justice, if a writ of execution be delivered to the sheriff against *A.* and *A.* becomes bankrupt before it be executed, the execution is superseded; and consequently the property of the goods is not absolutely bound by the delivery of the writ to the sheriff. But (by him) the *teste* of the writ binds against all sales and acts of the party himself.

Extent for the
King.

Note; in this case Mr. *Northey* said *arguendo*, that it is the common practice at this day, that if a *fieri facias* be delivered, and the goods appraised and sold, and the writ is not returned, and an extent for the King comes out of the Exchequer, it will over-reach the former sale. But *per curiam*, it is very dangerous practice.

S. C. Carth.

421, 491.

Salk. 144.

Comyns 76.

See 12 Mod.

386.

Salk. 397.

Copy of pro-
ceedings of
the college of
physicians.

Dr. Groenvelt *vers.* Dr. Burrell, &c.

DR. *Groenvelt* brought an action of false imprisonment against Dr. *Burrell*. The defendant justified under a judgment given against the plaintiff by the college of physicians, and a fine imposed by them, and commitment to prison. See before 213. And now Mr. *Northey* moved in behalf of the plaintiff, that the King's Bench would make an order, that the register of the college of physicians should

should permit the plaintiff to have copies of the proceedings and judgment, to enable the plaintiff to reply to the plea of the defendants, who were censors of the college. And he argued, that the plaintiff was a party to the judgment, &c. and therefore has a right to have a copy. Besides, the statute 46 Edw. 3. mentioned in the preface to the third Report, extends to this case, for it extends to the records of all publick courts. And it is the usual practice, if an action is brought for a false return upon a *mandamus*, upon which the party is returned to be disfranchised, that the King's Bench will make an order that the plaintiff shall have recourse to the publick books. And it is no objection, to say, that this will be to compel the defendants to discover their evidence; for the plaintiff does not pray to have an order to the defendants, but to the register, who is a party unconcerned and indifferent. *Sed non allocatur.* For *per curiam*, the King's Bench cannot oblige the college of physicians to permit the plaintiff to have any copy of their proceedings; for they act in a judicial manner by authority of an act of parliament, and therefore it shall be presumed that they have done right; and this record may be pleaded without a *profert* *Profert in curia.* in *curia*, and therefore no *oyer* can be prayed of it, and therefore the defendants shall not be bound to give a copy, for it would be in effect to discover their evidence. And the plaintiff has no right in this record; therefore this case differs from the case of the publick books of a corporation, for there the party has an interest. In the same manner where there is a dispute between a lord and a copyholder, the copyholder shall see the rolls, because he has an interest in them. If the lord of a manor claims land by forfeiture of his tenant for felony, he has a right to have a copy of the conviction, and he shall have it exemplified; but a man cannot have a copy of a record of a conviction of treason or felony without leave of the attorney general. In matters less criminal they never apply to the attorney general for copies of records, but they have them of course. All these cases are where rights are to be tried, and after issue joined; but this action is for a trespass, and not founded upon a right; and therefore the King's Bench cannot make any such order. And *per Holt* chief justice, if *A.* be indicted of felony, and acquitted, and he has a mind to bring an action, the judge will not permit him to have a copy of the record, if there was probable cause of the indictment, and he cannot have a copy without leave.

Giles *vers.* Hartis.

S. C. 2 Salk.
622.
Carth. 413.
Tender and
uncore *prist*.
Ante 44.
Comb. 334.
3 Salk. 353.

Indebitatus assumpsit for goods sold the eleventh of September, the defendant pleads a tender in April following, *et quod semper paratus fuit et adhuc est* since the tender. And this plea was pleaded after an imparlance. The plaintiff demurs. And *per Holt* chief justice, where debt is brought upon a bond conditioned to pay money at a day certain, if the defendant pleads a tender at the day, and that he has been always ready, &c. it is good. But in *assumpsit*, or debt upon a single bill, he must plead, that he has been always ready; for though the defendant tendered the money, and has been always ready since the tender to pay it, yet the plaintiff may have demanded it before, it being a duty from the time of the promise; and if the defendant did not pay it upon demand, his promise was broken, though he tendered it afterwards. But if he pleads that he was always ready, this refers to the time of the promise made, and not to the time of the tender.

Tender a bar
of damages.
Post. 644.

2. Though a tender is made, and the plaintiff refuses the money, yet the tender cannot be pleaded in bar of the action, neither in debt nor *assumpsit*, but in bar of the damages only, for the debtor shall nevertheless pay his debt.

Tender plead-
able after im-
parlance.
1 Lutw. 238.
Comb. 50.

3. In debt upon bond conditioned to pay a sum certain, a tender may be pleaded after imparlance. But in the principal case judgment was given for the plaintiff; for as the tender is pleaded, there might be a demand of the money which was due before the tender, between the time in which the money became due and the tender; in which case it cannot be pleaded, either in bar of the action, or of the damages: But if the defendant had pleaded *touts temps prist*, the plaintiff should have replied, and shewn the request, and the time when it was made. But if the tender had been pleaded at the day of the promise with *touts temps prist*, *Holt* chief justice doubted, whether it should be in bar of the action, or of the damages. He said, that in this action if it should be in bar of the damages, as it is in debt, it would be a bar of the whole demand; for since *indebitatus assumpsit* is to recover uncertain damages, the plea which will bar the plaintiff of his damages, will bar him of his whole demand. But he said, that he would find a means, by which the defendant in this action may excuse himself of the charge of the trial, and payment of costs, where he will pay what is due; as by bringing a sum of money into court, and praying judgment *de ulterioribus damnis*; or by confession of the damages to such a value, and praying that the plaintiff may proceed at his peril for the residue.

Tender, how
pleadable in
assumpsit.

fidue. As to these points, he gave no resolution. But he said, that he well remembred, that serjeant *Levinz* made the first motion, that upon bringing so much money into the King's Bench in *indebitatus assumpsit*, the plaintiff might proceed at his peril. And it was in the time of my lord chief justice *Keeling*, and it was thought an extraordinary motion. But *per Holt* chief justice, a man cannot plead a tender and *touts temps prist* in a *quantum meruit*, because the demand is intirely uncertain; nor could a man plead tender of amends in bar of any voluntary trespass at common law, except in case of damage feasant, to prevent the impounding of cattle, until the statute of 21 Jac. 1. cap. 16.

Tender not
pleadable in
quantum me-
ruit.

Amends.

Richards *vers.* Cornford.

Error. C. B.

Replevin. The defendant makes conusance as bailiff to the earl of *Montagu* and his wife, and shews, that the duke of *Albemarle* deviled the reversion of the premisses, expectant upon a lease for years upon which rent was reserved, to the duchess of *Albemarle* his wife, now wife to the earl of *Montagu*, and for rent-arrear he avows the taking of the distress. The plaintiff pleads in bar of the avowry, that the duke of *Albemarle* by deeds of lease and re-lease intailed the said lands upon the earl of *Bath, &c.* And issue thereupon. And verdict and judgment in C. B. for the avowant. Upon which the plaintiff in replevin brought his writ of error, and two errors were assigned, 1. That the lands were alleged to lie in *Enfield* and *Edmonton*; which is impossible, that the lands should lie in both parishes, but part may lie in one parish, and part in another. And a case was cited between *Treverton* and *Hickes*, *Pasch. 3 Will. & Mar. B. R.* It was alleged, that J. S. was seised in fee of lands lying in divers parishes, whereof the lands in question were parcel; and it was held impossible, and ill. But *per curiam*, it was adjudged in this case, that it was well enough; for according to common and reasonable intendment, part lies in the one parish, and part in the other. The second error assigned was, that the distress is taken for arrears of rent of two years; but it appears by the avowry, that the avowant had not title till the 29th of *September 1694.* and the distress was taken the 26th of *September 1696.* and the judgment is for the intire rent of two years; therefore the plaintiff has judgment for more than appears to be due to him by his own shewing, which is error. And by *Holt* chief justice, the avowry for the part of the rent which was not due till after the distress taken is ill; therefore the general judgment for all the rent is erroneous, and ought to be reversed for the whole,

S. C. 2 Salk.
580.
S. C. Comyns
42.
5 Mod. 363.
11 Rep. 45.
Bro Avowry
p. 6.
Ro. Rep. 33.
34. 35. 77.
Saund. 285.

Comprise.

Treverton v.
Hickes,
Carth. 185.
Bro. Barr.
p. 98.
1 Rep. God-
frey's c.
1 Ro. Abr.
434.
11 H. 6. 5.

Judgment for
more than it
appears that
the plaintiff
has title to
have.

Amendment.

whole, and is not good for any part. As if a lessor avows for rent and a *nomine poenae*, and the rent was not demanded, so that the *nomine poenae* was not due; a general judgment for both shall be intirely reversed. But if the court had abated the avowry for the rent which was not due, and had given judgment for the residue, he should have had return irreplevisable and good. But for the other reason the judgment was reversed, *nisi, &c.* Mr. Montague counsel for the avowant cited in this case 1 Co. 45. Moor 281. Hob. 133, 208. T. Jones 138. Yelv. 148. 3 Cro. 799. But afterwards the record in the Common Pleas was amended (for this error proceeded from the mistake of the attorney of the plaintiff in replevin, for the plaintiff brought two replevins, and the defendant made two avowries, and gave the records of them to the plaintiff's attorney, who made entry of the one avowry to this replevin, whereas it should have been entred to the other replevin, and so *vice versa*) and by it the transcript was amended in the King's Bench also; upon which the avowant prayed, that the judgment might be affirmed. But it was ordered that the record should be put in the paper again, because there might be more errors. And afterwards it was affirmed.

Rex *vers.* Griepe.

S. C. Comyns
43.
S. C. 2 Salk.
513.
5 Mod. 343.
Carth. 421.
Information
for perjury.

AN information was exhibited against the defendant for false and corrupt perjury at common law. And the information shews that there was a suit in replevin *in C. B.* between *Richards* plaintiff and *Cornford* defendant; and that upon the trial at the bar of the Common Pleas the plaintiff produced in evidence indentures of lease and release, bearing date the fifteenth and sixteenth of July 1681, which were then executed by *Christopher* duke of *Albemarle*, at *Albemarle house* in the parish of *St. Martin in the fields* in *Middlesex*; and that Mr. *Edward Strode* was produced at the trial as a witness, to prove the execution of these deeds; and that the defendant *Griepe* was produced as a witness at the same trial for the defendant; and that he swore, that Mr. *Strode*, innuendo the said *Edward Strode* the witness *praedict.* was commorant all the middle of the month of July, 81. innuendo the year 1681 at *Newnham*, innuendo *quandam domum mansionalem praedicti Edwardi Strode vocatam Newnham in parochia de Plimpton St. Mary in Comitatu Devon.* *ubi revera* the said *Edward Strode non fuit ad Newnham praedict.* in the said month of July 1681. Upon not guilty pleaded verdict was given for the King. Upon which the defendant's counsel moved in arrest of judgment, and argued their exceptions several times. And now the court pronounced their opinions in solemn arguments, that the judgment ought to be arrested, but as it seemed,

seemed, for different reasons. The three justices *Rokeby, Turton,* and *Eyre*, made but two points in the case. 1. Whether the words sufficiently ascertained the place, to make it material to the matter in issue without the *innuendo*. 2. Admitting that they did not, then whether the *innuendo* will help it. And as to the first point they held, that though a man swear falsely, yet if it be in a matter immaterial to the issue, it will not amount to corrupt perjury; for the reason that perjury is so high a crime, is, in respect of the injury that it does to a man; but if it is not material to the issue, it cannot by any means induce the jury to give their verdict one way or another, and consequently cannot injure the other party, against whom the verdict is given. 3 *Inst.* 164. 7. 2 *Bulstr.* 150. *Hob.* 53. 11 *Co.* 113. *Cro. Car.* 353. per *Richardson* chief justice. *Stile* 336. 2 *Roll. Rep.* 369. *Yelv.* 61. 2 *Roll. Rep.* 41. *Yelv.* 111. And *Turton* justice cited the opinion of *Popham.* *Goldsb.* 191. that if *A.* swears that he saw *B.* steal, &c. such a deed, and when he did it he was dressed in blue, where in truth he was not dressed in blue, this is not perjury. So if a man swears to his belief, or *ad effectum*, if it be false (by him) he cannot be convict of perjury. Then to apply this to the first point, the judges said, that it does not appear what distance there was between *Newnham* and *Albemarle house*, and therefore *Newnham* may be adjoining to it, and then Mr. *Strode* might have been at both places the same day; and so his being at *Newnham* would not falsify his oath, that he saw the deed executed at *Albemarle house*, for both might well stand together, and consequently the oath of *Griepe*, that Mr. *Strode* was at *Newnham*, will not be material to the issue, and therefore no corrupt perjury. And to make this material to the issue, it must be presumed, that this *Newnham* is in *Devonshire*, which would be in effect to make this constructive perjury, which ought not to be allowed any more than constructive treason. And as to the objection, that this information is for perjury at common law, which is punishable, though it be not corrupt or material to the issue, or prejudicial to any; the whole court answered, that the statute only inflicts a greater punishment, but does not alter the nature of the offense. And *Holt* chief justice said, that perjury at common law was an infamous crime, and the statute of 11 *Hen.* 7. supposes so. And in the *Mirror of justices*, title *Infamy*, perjury is mentioned. So *Fortescue de laud. leg. Angliae*. There is no reason therefore for any diversity in the crimes, upon statute or at common law; but the punishments are different, for in convictions upon the statute, disability is part of the judgment, but at common law it is only a consequence. And therefore in this case the King may pardon and restore the party to his testimony, but upon the statute he cannot. The punishment upon the statute is certain, and confined to the direction of the statute; but at com-

mon law it is discretionary in the court, and they may inflict greater fines than the statute prescribes; and therefore the charge ought to be as certain at common law as upon the statute. Another difference is, if a man brings an action upon the statute, he ought to shew particularly how he was damnified, as that the verdict passed against him, or that too great damages were given against him; but in indictments or informations it is not necessary to be shewn. 2 Leon. 211. *Hamper's case*.

But as to this point *Holt* chief justice held, that the information was ill without the *innuendo*; for *Newnham* must be a *ville*, hamlet, or *lieu conus*. In the general intendment of law it is a *ville*, but it is but an *individuum vagum*, and no man can know where it lies, and therefore the court cannot know where it lies, for in pleading it is necessary to shew the county where the *ville* lies; for if a *ville* be alleged, and no county where it lies, no process can issue upon it. 34 Hen. 6. 49. 60. 4 Hen. 7. 8. *Scire facias* upon a recognizance for breach of the peace; the breach was assigned in a *ville*, and no county where was mentioned, and when the jury was brought to the bar they were discharged, and the information set aside. But in some cases the *ville* alleged shall be intended to be in the county where the action is brought; as if trespass is brought in *Middlesex* for a trespass done at *Islington*, *Islington* shall be intended to be in *Middlesex*, because that is the *git* of the action. But if a place is mentioned in matter collateral to the issue, it is necessary to shew in what county it lies, or otherwise it shall not be intended to be in any county. Therefore *Newnham* in this case is unknown to the court as to the situation, and the breach assigned is ill for this uncertainty. And as to the objection by the King's counsel, that it appears by the defendant's oath, that *Newnham* is a place different from *Albemarle house*, and it is sworn in contradiction to Mr. *Strode's* evidence, and induces a suspicion in the jury of the evidence given by Mr. *Strode*, and therefore it is not material, whether *Newnham* be near, or very far off from *Albemarle house*. *Holt* chief justice answered, that he was of opinion, that it is not necessary to appear in an information for perjury, to what degree the point in which the man is perjured, was material to the issue; for if it is but circumstantially material, it will be perjury. And therefore (he said) he doubted much of the case cited by *Turton* justice out of *Gouldsbor*. For (by him) if *A.* swears, that *B.* delivered a deed in a blue coat, where in truth he was in a red; this will be perjury, for a witness swears to the circumstances. So if a witness swears to the credit of another witness; if it be false it will be perjury, if it conduces to the proof of the point in issue. But if *A.* being produced as a witness to prove that *B.* was *compos mentis* when he made his will, swears that such a day

Perjury in a thing circumstantially material to the issue.

a day he left his own house, and went to C. and lay there, and the next day lay at D. &c. if he swears falsely in these circumstances immaterial to the point of the issue, it will not be perjury. (Note, this alluded to the oath of Mr. *Wilkinson*, who was produced as a witness at the trial between Sir *Isaac Rebowe* who married the wife of Mr. *Honeywood* of *Essex* and his executrix, and Sir *John Cotton* who married the heir at law of Mr. *Honeywood*, and there in his evidence to prove Mr. *Honeywood compos mentis* when he made his will, he recited a very long story of such impertinent circumstances.) But in this principal case (*per Holt* chief justice) though *Newnham* was next adjoining to *Albemarle house*, so that Mr. *Strode* might have been at both places the same day, yet if he was not at *Newnham* it will be perjury in *Griepe*, who was sworn in contradiction to Mr. *Strode's* oath. (And in this point he was of a contrary opinion to all the other judges.) But for the afore-said uncertainty it cannot be known where *Newnham* was, and therefore ill.

As to the second point, whether this uncertainty is not aided by *Innuendo*. the *innuendo*; all the justices agreed that the *innuendo* could not aid it. 1. Because the *innuendo* imports some other thing than is intended by the oath, and is an addition of new matter, which is ill. For by common intendment *Newnham* mentioned in the oath is a ville, but the *innuendo* restrains it to a *lieu conus*; and this reason was given chiefly by *Holt* chief justice. But, 2. All the justices said, that no *innuendo* could supply the defect of certainty before; for an *innuendo* signifies nothing unless there be some matter of fact precedent, to which it may refer. If words are actionable, and then an *innuendo* comes by way of explanation, that will be good; but if not, the addition of an *innuendo* will not make them actionable. *Hob. 6. 4 Co. 17.* Then as great a certainty is required in indictments and informations as in actions upon the case; but if Mr. *Strode* had brought an action upon his case against *Griepe* for slander of his title, shewing that *Griepe* had said, Mr. *Strode* has no title to *Newnham*, *innuendo Newnham* his house in *Devonshire*, it had been ill. But if he had declared, that Mr. *Strode* was seised in fee of *Newnham* in *Plimpton* in *Devonshire*, and then had shewn that *Griepe* had said, Mr. *Strode* has no title to *Newnham*, *innuendo Newnham* in *Plimpton* in *Devonshire*, that *innuendo* had been good, because there would have been precedent matter sufficient to which it might refer; and if *Griepe* had intended another *Newnham* he ought to shew it in his plea. 1 *Roll. Abr. 78. pl. 3. 1 Cro. 321. Alleyn 32.* So in this case, if the information had said, that the question upon the evidence at the trial was, if Mr. *Strode* was at his house at *Newnham* in *Plimpton St. Maries* in *Devonshire*, and then had gone on to shew, that Mr. *Griepe* swore, that Mr. *Strode* was

was at *Newnham*, *innuendo*, &c. as in this information, it had been good. And *Holt* chief justice said, that the information might have averred positively, that the question upon the trial was, whether *Mr. Strobe* was at *Newnham* in *Plimpton*, although at the trial *Newnham* was mentioned generally; for this should be understood according to the subject matter which should appear upon the trial in the information. But in this case there is nothing to induce this *innuendo*, and therefore it is ill; for an *innuendo* is no averment, and it is never proved at the trial. And for an authority in point all the court relied upon 3 *Cro.* 428. *Regina v. Bowles*, the record of which *Holt* chief justice brought in to court, viz. *Mich.* 37 & 38 *Eliz.* *Rot.* 36. And as to the objections, he gave these answers.

Obj. Reject the *innuendo*. *Palm.* 358.

Answ. This might be done if no use were made of it. But here no such liberty is left to the court, for the assignment of the perjury refers immediately to the *innuendo*, *ubi revera non fuit ad Newnham praedict.* Besides, that without the *innuendo* there is no certainty, as before is said.

Obj. The office of an *innuendo* is to explain dubious words. *Yelv.* 21. 1 *Cro.* 378.

Answ. That is true, but it is when there is sufficient matter to induce the *innuendo*. Therefore between *Coggs* and *Rogers*, case for words, the plaintiff declared, that the defendant said, "The shoemaker over the way is broke," *innuendo* the plaintiff; it is ill, for then any shoemaker might bring an action; but if the plaintiff had said, that he lived over right, and that he was a shoemaker, &c. and then had declared as before, this had been good, for the *innuendo* had been well induced.

Obj. There is but one *Newnham* in the record, and therefore the court must intend that there is no more.

Answ. That one is mentioned only in the *innuendo*, and therefore signifies nothing.

Obj. 1 *Cro.* 192.

Answ. The words there were spoken to the servant, and therefore the *innuendo* was good; but it had been otherwise, if they had not been spoke to the servant.

Obj.

Obj. *Pasch. 20 Car. 2. B. R. Rot. 91. Rex vers. Lewin*, in information for perjury against *Lewin* it was set forth, that he swore, that he brought him up in the art, *innuendo* the art of a founder, *ubi revera* he had not brought him up in *arte praedieta*. Rex v. Lewin; Sid. 405.

Answ. *per Holt*. That is no authority; for *Lewin* had been indicted before for the same thing, and he pleaded *autrefois acquit*, and then being indicted for another point, it was amended.

Obj. The verdict finds, that *Griepe* meant *Newnham* in *Devonshire*.

Answ. The verdict cannot find that, for a man's meaning abstracted from the fact, cannot be put in issue. 4 *Edw. 4. 8.* 47 *Edw. 3. 16.* 5 *Co. 77.*

Obj. If a man swears generally or dubiously, it shall be left to the King to interpret.

Answ. That opinion is very dangerous, and destructive to the safety of human kind.

3. Point. Whether the assignment should refer to *Newnham* in the *innuendo*? And by all the judges it was resolved, that it should. For *ubi revera non fuit ad Newnham praedieta*. this *praedieta* refers to the last antecedent, which is *Newnham* in the *innuendo*. Besides, that *per Holt* chief justice, where a place is indefinitely mentioned, *praedieta* is not a proper word, but it ought to have been, *non fuit apud aliquam villam, &c. cognitam per nomen de Newnham*; or otherwise it might have been, *non fuit apud Newnham praedieta. nec aliquam aliam Newnham*; for in this case he might have been at *Newnham*, though not at *Newnham* aforesaid; for where a general is mentioned, assignment of a breach in particular is not good. And for these reasons judgment was arrested by the whole court. But because the court was satisfied, that the defendant was guilty of corrupt and wilful perjury; they made an order, that he should not be discharged of his bail, and that leave should be given to the informer, to exhibit a new information. Praedieta. refers to the last antecedent.

Note, this case was removed by error into the house of peers, and after hearing of council, when all the lords seemed to be of opinion to affirm the judgment, it was put to the vote, and the judgment was reversed by the majority, without giving any reason, as *Holt* chief justice told me.

X x x

Sir

Sir Richard Raine's case.

f. l. 12. A. 2.
136.
S. C. 1 Salk.
299. *g.*
Carth. 457.
Supersedeas to
a mandamus.
1 Vent. 335.
1 Salk. 36.
Show. 294.

Contempt in
the spiritual
court.

Where a *man-*
damus shall be
granted to
compel the
spiritual court
to grant ad-
ministration.

Probate unde-
niable evi-
dence.

2 Keb 337.
Noel v. Wells.
12 Mod. 136.

MR. Grey made a will dated the 25th of March 1697. but did not sign it, in which he made Mr. Tench, &c. executors, and afterwards died in April following. After his death the executors produced this will in the prerogative court to prove it, but the court doubting of the validity, because it was not signed by the testator, issued a citation, to summon in all the persons, who would be intitled to administration, if this will should be adjudged null. And they all appeared, and retained proctors, except Mr. Grey, brother of the party deceased, who was in contempt, for which the court proceeded against him *ad excommunicandum*. Upon which the last day of Trinity term last past Mr. Grey moved in B. R. for a *mandamus* to be directed to the judge of the prerogative court, to command him to grant administration to him as next of kin to his brother deceased, upon suggestion that he died intestate. And a *mandamus* was granted, returnable the beginning of this Michaelmas term. And now Mr. Northey moved for a *supersedeas* to the *mandamus*, upon *affidavit* that Mr. Grey made a will, the validity of which is now in contest in the prerogative court. And a *supersedeas* was granted by the whole court. 1. Because they said that the court was surpris'd in the former motion; for they were not informed, that Mr. Grey the brother was in contempt in the prerogative court, of which if they had been apprised, they would have denied the former motion; for the party who makes such a motion, ought first to resort to the spiritual judge, and request the granting of administration to him, and not be in contempt for the same thing. But 2. *Holt* chief justice said, that the difference always is, when it is admitted on all sides that the party died intestate, and when not. When it is admitted, then if the ordinary will not grant to the next of kin, the King's Bench will grant a *mandamus*. But if a will is produced, the judge of the spiritual court must determine whether the will be good or not, before he grants administration. For if he grants administration, and afterwards the will is proved, the grantee will be executor of his own wrong. And the judge of the spiritual court is the only proper judge, to determine the validity of wills for things personal, and therefore the probate is undeniable evidence to a jury. And *Holt* chief justice said he remembered a case, which was in the time of lord chief justice *Kelyng*, where an executor brought an action, and at the trial produced the probate, at *nisi prius* at *Guildhall*; and the defendant's council offered to prove, that the supposed testator died intestate, but *Kelyng* chief justice told them, that the probate was evidence uncontrovertible; and

and afterwards it was moved by his order, and all the other judges concurred in opinion with *Kelyng*; and so it has been always held since. Therefore if Mr. Grey will demand a return of the *mandamus*, if the judge of the prerogative court makes return of the substance of the *affidavit*, it will be a very good return; or if he returns that Mr. Grey made a will positively, although there may be an appeal and the will thereupon adjudged null, yet no action upon the case will lie upon that return, because the party who made the return, was the proper judge of the subject matter, and no action lies against a man for what he does judicially. To all which things the other judges agreed. No action against a judge.

Ashton *vers.* Sherman.

DEBT upon bond against the defendant as administrator to *Field*. The defendant pleads six judgments against him on bonds in which *Field* was bound, *ultra quae* he has not *assets*. The plaintiff replies to four, *obtent' per fraudem*; and as to the other two, that the defendant hath *assets ultra* them, *et hoc petit quod inquiratur per patriam*. The defendant demurs specially. Resolved, that the replication is ill; for when the defendant pleads six judgments, he confesses by implication, that he hath *assets* over five; then when the plaintiff says, he has *assets ultra* two, and tenders an issue, if this issue should be admitted, it would chase the defendant to take an issue that would be against him, for in effect he has confessed the fact before; and a man cannot oblige another to an issue of fact which he has confessed before. And therefore *per Holt* chief justice, the case of *Croydon v. Atway*, 1 Roll. Abr. 802. pl. 6. is not law as to this point. But if the plaintiff had said, that the defendant had *assets ultra* two judgments, *et hoc paratus est verificare*, although it ought to have been omitted, yet it should be but surplusage, and should not vitiate. But the better way is only to answer to such judgments, as he knows to be obtained by fraud; and if any of them are found for the plaintiff, he shall have judgment; because it would appear that the defendant hath *assets*, for by pleading six judgments, he confesses *assets ultra* five. And therefore *Holt* chief justice denied the case 1 Saund. 337. *Hancock v. Prowde*, to be law. But all the court were of opinion, that the replication was not double, according to 2 Saund. 49. But the court gave leave to the plaintiff, to amend his replication upon payment of costs.

S. C. 1 Salk. 298.
Carth. 429.
Lilly Entr. 158.
S. C. 12 Mod. 153, 229.
Comb. 444.
449.
Post 679.
If an executor pleads six judgments against him, over which he hath not assets, he confesseth that he hath assets over five.
A plaintiff in his replication cannot chase the defendant to an issue upon a fact which he has confessed in his plea.
See 9 Co. 168, 9.

Duplicity.

Turberville

Turberville *vers.* Stampe.S. C. Skin.
681.Carth. 425.
1 Salk. 13.Case for negli-
gently keep-
ing his fire.Comb. 459.
Skin. 681.12 Mod. 151.
S. C.Comyns 32.
S. C.

Act of God.

General de-
claration.Act of a
stranger.Act of a ser-
vant charges
the master.

CASE grounded upon the common custom of the realm for negligently keeping his fire. The plaintiff declares, that he was possessed of a close of heath, and that the defendant had another close of heath adjoining; that the defendant *tam improvide et negligenter custodivit ignem suum*, that it consumed the heath of the plaintiff. Not guilty pleaded. Verdict for the plaintiff. And Gould King's serjeant moved in arrest of judgment, that this action ought not to be grounded upon the common custom of the realm; for this fire in the field cannot be called *ignis suus*, for a man has no power over a fire in the field, as he has over a fire in his house. And therefore this resembles the case of an inn-keeper, who must answer for any ill that happens to the goods of his guest, so long as they are in his house; but he is not answerable, if a horse be stolen out of his close. And in fact in this case the defendant's servant kindled this fire by way of husbandry, and a wind and tempest rose, and drove it into his neighbours field; so that it was not any neglect in the defendant, but the act of God. *Sed non allocatur.* For *per curiam* as to the matter of the tempest that appeared only upon the evidence, and not upon the record, and therefore the King's Bench cannot take notice of it, but it was good evidence to excuse the defendant at the trial. Then as to the other matter, *per Holt* chief justice, *Rokeby* and *Eyre* justices, a man ought to keep the fire in his field, as well from the doing of damage to his neighbour, as if it was in his house, and it may be as well called *suus*, the one as the other; for the property of the materials makes the property of the fire. And therefore this action is well grounded upon the common custom of the realm. But *Turton* justice said, that these actions grounded upon the common custom had been extended very far. And therefore (by him) the plaintiff might have case for the special damage, but not grounded upon the general custom of the realm. But by the other justices judgment was given for the plaintiff. Note Mr. *Northey* for the plaintiff cited 40 *Affis. pl. 9. Fitz. issue 88. double plea 31. 28 Hen. 6. 37. 21 Hen. 6. 11. b. Raft. Entr. 8. and Old Entr. 219.* where the declaration is general for negligently keeping his fire in such a parish, without specifying a particular house or ground. But *Holt* chief justice answered, that that was an antiquated entry. And (by him) if a stranger sets fire to my house, and it burns my neighbour's house, no action will lie against me; which all the other justices agreed. But if my servant throws dirt into the highway, I am indictable. So in this case if the defendant's servant kindled the fire in the way of husbandry and proper for

for his employment, though he had no expresse command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended, that the servant had authority from his master, it being for his master's benefit.

Mosely *vers.* Warburton.

A *Levari facias* issued to the bishop of Chester, to require him S. C. 1 Salk. 320. to levy the debt upon the defendant *de bonis ecclesiasticis*, Warburton being a fellow of Magdalen college. Upon which the bishop writes to the warden and fellows of the college, requiring them to pay the pension of Warburton to him. To which the warden and fellows answer, that they have not power to do it. Upon this a motion is made in B. R. on behalf of the bishop of Chester, for advice of the court, what the bishop ought to do. And per Holt chief justice, if a prebendary hath a sole body, the bishop upon a *levari facias de bonis ecclesiasticis* may sequester it; but if he hath but a body aggregate with the dean and chapter, he cannot sequester it. Then in this case the profits of the fellowship are but casual dividends, in which before division Warburton hath no interest, so that they do not make an estate; and it seems in this case Warburton is not *clericus beneficiatus*, and the bishop may return *nulla bona ecclesiastica*. And though the college hath the impropriation of a church, yet it belongs to the whole body, and not to one of them only. But the court would not give a positive opinion, because the case did not come judicially before them.

Sparks *vers.* Crofts.

SPARKES brought an action against Crofts, as administrator generally to J. S. Crofts pleads that he was administrator *durante minoritate* of his wife; and this was in abatement. The plaintiff demurs. And adjudged, that the defendant should answer over. For though a man cannot charge an administrator *durante minoritate* generally as administrator, because it is a particular sort of administration, and if a man obtains judgment against such an administrator, if afterwards the administrator or executor comes of age, a *scire facias* lies against him upon this judgment. Yet the defendant ought to aver, that he continues administrator *durante minoritate*; which he has not done here, for he has not said, that his wife is in life, and under the age of seventeen. See 5 Co. 29. Pigot's case. Afterwards the defendant came and pleaded, that administration was committed to him during the minority of his wife, and that his wife died since the last continuance. And per Holt

S. C. Comb.

465.

S. C. Carth.

432.

3 Danv. Ab.

387. p. 15.

Plea in abate-

ment that the

defendant is

administrator

durante mina-

ritate.

Puis la darrein

continuance.

Y y y

Holt

Holt chief justice, 1. This plea is contradictory to the admission of the defendant, for by ill pleading before the defendant admitted himself administrator generally, and therefore this plea is ill.
2. *Holt* chief justice doubted, whether a man could plead a plea *puis darrien continuance* after a demurrer; although *Hob.* 81. is so, *Stoner v. Gibson*.

Dorney vers. Cashford. B. R.

S. C. Comyns 44. S. C. Salk. 363. Que estate of a term. Carth. 432. 1 Salk. 365. *Strode v. Birch*, 4 Mod. 18. See 3 Lev. 19. Lutw. 81. **C**ASE for obstructing a private way. The plaintiff declares, that he is possessed for a term of years of a house, and that he and all those whose estate he hath in the house, time whereof, &c. *habuerunt et habere debuerunt* a way, &c. that the defendant obstructed, &c. Upon the general issue pleaded, verdict for the plaintiff. But after divers motions in arrest of judgment, by the whole court judgment was arrested. For though it had been good to declare against a wrong-doer, that he *habere debuit viam*, &c. as was lately adjudged in this court in a case between *Strode* and *Birch*, which was so adjudged in the Common Pleas, and the judgment affirmed in the King's Bench after several arguments, without a prescription; yet here the plaintiff has laid a *que estate* in himself, when he is but lessee for years, which is impossible, for he cannot have the estate of any other, but only his own. And *Holt* cited a case, which was in B. R. in the time of *Hale* chief justice, where in an action upon the case brought by a lessee for years for stopping his lights, the plaintiff declared as here with a *que estate*; and it was moved in arrest of judgment, and the plaintiff could never procure judgment.

Comyns 7. The case of *Strode vers. Birch* was case, where the plaintiff declared, that he *fuit et adhuc est* lawfully possessed of a tenement, &c. *et quod de jure habuit et habere debuit* common of pasture in a thousand acres, for all cattle *levant and couchant*, &c. *tantum ad tenementum praedictum appertinentem*; that the defendant to deprive the plaintiff of his common dug coney-burrows: Upon demurrer, judgment for the plaintiff in C. B. and affirmed in B. R. because the defendant was a stranger, and therefore possession a good title against him.

Replevin for cattle taken in a place called B. The defendant avows that *Mellor* was seised in fee of the place where, &c. and demised to the defendant for ten years, and he took the cattle there *damage feasant*. The plaintiff pleads in bar, that Sir *Richard Sturtin* was seised in fee of a hundred acres contiguously adjoining to the place where, &c. and that the defendant, and all those whose estate

estate he hath, &c. have used to repair the fences between the hundred acres and the place where, &c. and that the hedges being down, the plaintiff's cattle entered into the place where, &c. The defendant demurs. And adjudged for him. For no man can lay a *que estate* in a lease for years. Adjudged *Trim. 9 Will. 3. C. B. Aston vers. Gwinnell.*

Rex vers. Harris and Duke.

Harris and Duke were found guilty of perjury at a trial at bar, S. C. Skin. 684. in an information exhibited against them; and upon the *capi-* 1 Salk. 400, 56. as they were outlawed; and upon the return of the exigent Mr. Conyers counsel for the earl of Bath, who was the prosecutor, moved that judgment should be given against them in their absence. Judgment for corporal punishment. But *per Holt* chief justice, no judgment for corporal punishment can be pronounced against a man in his absence; and no writ can be granted to seize a man and set him in the pillory. Therefore the motion was denied.

Winter vers. Loveden.

Ejectment for lands in *Somersetshire*. Upon the general issue S. C. Comyns 37. pleaded, as to three parts the jury found the defendants not S. C. Salk. 537. guilty; and as to the fourth they gave a special verdict, that the lands in question are customary lands, parcel of the manor of *Goat-* 5 Mod. 244, &c. 378. *hurst*, and demised and demisable by copy of court-roll at the will Carth. 427. of the lord; according to the custom of the manor, time whereof, Power to makes leases. &c. that *George Powlett* was seised in fee of the manor of *Goat-* *hurst*, and had issue *Edward Powlett*; that *George Powlett* 9 Jac. 1. in consideration of the marriage of his son, and of the marriage portion, settled the manor of *Goathurst* to the use of himself for life, remainder to his wife for life, remainder to *Edward Powlett* and his heirs males of his body, &c. remainder to the heirs of the body of *Edward*, &c. with a proviso, that *George Powlett* should have power during his life, and his wife should have power after his decease during her life, to demise the premises in possession for one, two or three lives, or for thirty years, or any other number of years determinable upon one, two or three lives, or in reversion for one, two or three lives, or for thirty years, or for any other number of years determinable upon one, two or three lives, so that the demise be not of the ancient demesne lands, parcel of the premises, or any of the other lands used or reputed demesne lands within seven years before the settlement, and so as the ancient rent be reserved, &c. the jury find that the marriage took effect,

Construction
of powers.

effect, and that *Edward Powlett* had issue four daughters, the eldest of whom was the lessor of the plaintiff; they find, that *Powlett* by indenture between him and *Robert Blanchburne* settling that *Robert Blanchburne* and his wife held certain lands in the parish of *Goatburf* (which are the lands now in question) by copy of court-roll for their lives, in consideration of 60*l.* sold the said lands to *Robert Blanchburne*, *habendum* for thirty years to commence immediately after the death, surrender, forfeiture or other determination of the estate of *Blanchburne* and his wife; they find, that *George Powlett* and *Elizabeth* his wife, *Edward Powlett* and his wife, and *Robert Blanchburne* and his wife, are dead. *Robert Blanchburne* entred and was possessed, and assigned to defendant *Leveden*, who was possessed, &c. And after several arguments at the bar, the court in solemn arguments pronounced their opinion for the plaintiff, but they differed in their reasons. *Rokeby* justice said, that the question was, whether this lease was within the power; and he was of opinion, that it was not; he said, that the rules for constructions of powers are, 1. That they ought to be interpreted according to the intent of the parties. 2. They ought to be pursued strictly. In this case (by him) the intent was, to enable *George Powlett* to continue the estate in lands as it was at the time of the making of the settlement; but with some restrictions, 1. He could not demise the lands which were the sustenance of the family. 2. Nor make any leases without determinability. 3. Nor destroy the copyhold estates. And he was of opinion, that this lease was not void for the breach of the branch, *viz.* for demise of the copyholds, which in law are demesnes. For though in strictness of law copyholds are demesnes yet it was not the intent of the power to include them within the word demesnes. But (by him) by the third restriction the demise of the copyholds is void; because it breaks the implied condition; for such a power would destroy the copyhold manor and copyhold, which is contrary to the intent of the parties. 4. The lease is an absolute lease, and therefore void; for the determinability goes to all the years there mentioned, as well the term of thirty years as for the uncertain number of years. And the words [or for] in the last limitation make a difference, *George Powlett* would have a greater power to make leases in reversion than in possession, which would be unreasonable. For in possession the term for thirty years ought to be determinable upon two or three lives, and not absolute. *Holt* chief justice, and *Eyre* justices argued also for the plaintiff. And *Holt* justice said, that the great question was, whether this lease was pursuant to the power. And therefore, 1. It is considerable whether the term for thirty years absolutely be within the power. 2. Whether the lands demised are within the power.

the first, he conceived, that the land was in possession of *Blanch-
burn* at the time of the making of the settlement, but that
does not appear by the verdict. For if a man has power to make ^{Power in the}
leases in possession or reversion, if he makes a lease in possession ^{disjunctive.}
once, he shall never after make a lease in reversion, for he has an
election to do the one or the other, but not both. Therefore if
the copyhold was demised after the settlement in possession, he
could not have executed this power to demise in reversion. But he
said, that he would not declare his opinion of that, because it did
come judicially before him. And, 1. (by him) This lease as a
lease in reversion is within the power, for a lease in reversion in <sup>Lease in re-
version, what?</sup>
the largest sense signifies a lease made to begin *in futuro*. *Co. Lit.*
44. and in that sense is opposed to a lease in possession; but that
is not meant here. 2. It signifies a lease to begin from and after
a lease, &c. in possession. The statute of 14 *Eliz.* which restrains
the clergy from making of leases in reversion is to be understood of
leases *in futuro*. So was the case of *Baily v. Muns* in the time of ^{2 Vent. 244.}
lord chief justice *Hale*. *Intr. Trin. 23 Car. 2. B. R. Rot. 1012.*
contrary to the opinion in the case of *Thomson and Trafford* in
Popham. But in the case of a lease for life within this power,
it must be intended of a lease of the reversion, and not of a lease
in futuro, because the freehold must commence in possession im-
mediately. Then the question here is, if this lease in reversion
might be absolute; and he held that it might, for it is within
the reason of *Finch's* case 6 *Co.* 39. It is to demise in reversion
for one, two or three lives, or for thirty years, or for any other
number of years determinable upon one, two or three lives. These <sup>Construction
of a sentence.</sup>
words [or for] disjoin the sentences, and make them several, and
go to the latter part by way of enlargement of the power. 1 *Leon.*
119. Where words tend to enlargement they shall never be con-
strued to be a restraint upon the former clause. If this power be
considered with relation to the interest intended to be passed by the
power, it is very reasonable, for thirty years bear a proportion to
three lives. Heretofore twenty one years were accounted propor-
tionable to three lives, but now thirty years are looked upon as pro-
portionable to three lives. Then though it may be thought ridi-
culous to have a greater power, to make leases in reversion, than
in possession, nevertheless the words carry this construction, by
which the court ought to be guided; and though it seems odd,
yet it is part of the bargain. And therefore he was of opinion,
that an absolute lease for thirty years was warranted by the power;
to which *Turton* and *Eyre* justices agreed.

2. By *Holt* chief justice these copyhold lands are excepted out
of the power. His brother *Rokeby* was of opinion, that this was <sup>Copyhold part
of the de-
mesnes.</sup>
an exception implied; but (*per Holt* chief justice) since it is un-
reasonable,

Z z z

2 Cro. 599.
Yelv. 222.

Tenant for
life of a manor
with power
to make lea-
ses, makes a
lease of a co-
pyhold, this
destroys it for
ever.

Freeman's
Rep. 508. pl.
682.

reasonable, that these lands should be within the power, and they are both within the words of the exception, and the meaning of it, it is very reasonable to confine the exception to the strict words; and since copyhold lands are part of the demesnes, they shall be excepted by the word demesnes. If a man aliens all his demesnes, except the services of his freeholders and copyholders, the manor remains; which could not be if the copyholds were not demesnes. Besides, that it is unreasonable, to enable a tenant for life, to destroy the copyhold, which he might do without this construction of the power, for the power being derived out of the inheritance, if these copyhold lands were out of the exception, this lease, though made by a bare tenant for life, would destroy them for ever. And this power is limited to the wife, which is more unreasonable. And there was no occasion for a power to enable a tenant for life to make such leases, for he might by the custom have granted customary estates. Therefore since the words are comprehensive enough, and it is reasonable, he would construe copyholds to be within the exception under the word demesnes.

Objection. If you construe copyholds to be within the exception under the word demesnes, there will be no lands for the power to have operation upon.

Answer. There are other lands found in the verdict, whereof *George Powlett* was seised.

Obj. Though there are other lands found, as *Bridgwater*, that is not to the purpose, for the words of the power are confined to the manor.

Restrictive
clause in a
power.

Ans. The power does not extend to all the manor, but to so much of the manor except the demesnes. And it is not contrary to the premisses, for though copyholds and demesnes are excepted, yet there are rents and services, and that is sufficient to satisfy the power; for though no rent can be reserved out of them, yet since there is a power to lease them, that will be sufficient; for where there is a power to demise divers things, and there is one qualification which does not extend to them all, the power may be executed in the rest. And for this *Holt* cited 2 Roll. Abr. 262. pl. 115. and the case of *Walker* and *Wakeman*, which he put at large. See the case, 1 Ventr. 294. 3 Keb. 554. So in this case *George Powlett* might lease the rents and services without reservation of any rent; and so all the words of the power are satisfied. But if the demesnes might have been demised, no construction could have been made, to separate the services from the demesnes. But since the demesnes could not be demised, it is reasonable that he should

should be able to demise the rents and services to satisfy the power. *Turton* and *Eyre* justices agreed. And judgment was given for the plaintiff.

Evans vers. Marlett.

IF goods by bill of lading are consigned to *A.* *A.* is the owner, *S. C.* 3 *Salk.* 390. and must bring the action against the master of the ship if they are lost. But if the bill be special, to be delivered to *A.* to the use of *B.* *B.* ought to bring the action. But if the bill be general to *A.* and the invoice only shews, that they are upon the account of *B.* *A.* ought always to bring the action, for the property is in him, and *B.* has only a trust, *per totam curiam.* And *per Holt* chief justice, the consignee of a bill of lading has such a property as that he may assign it over. And *Shower* said, that it had been adjudged so in the Exchequer. *Cases in B. R.* 156. *12 Mod.* 156. *3 Salk.* 290. *Property.* *Assignment.*

Shermoulin vers. Sands.

S*hermoulin* libelled in the admiralty, for that, that he and others equipped a ship for a voyage, and *T.* the defendant there unlawfully took her from him. *T.* pleaded there, that this ship was taken by *Du Barth* upon the high sea, and that he bought her of *Du Barth* at *Bergen.* *Shermoulin* replied, that she was taken unlawfully. And so the question there was, whether the capture by *Du Barth* hath altered the property. And a decree was made for *Shermoulin.* Upon which *T.* appealed to the delegates, and pending the appeal moved for a prohibition. *Northey* against this cited the case of the *King* and *Broome,* *Trin. 9 Will. 3.* *Broome* captain of a man of war took a *French* ship upon the high sea in the *West Indies,* which afterwards was condemned in the admiralty in *England* for prize; and he sold her at *Barbadoes;* and then returning to *England,* the *King* libelled in the admiralty against him for the ship and goods; and *Broome* moved for a prohibition, upon a suggestion that the conversion was upon the land; but it was denied, because the original cause, which was the capture, was upon the high sea, and immediately upon the capture the captain became chargeable to the *King;* so that though he broke his trust at land, yet the right, which is the cause of the action to the *King,* commenced upon the high sea, and so proper for the admiral's jurisdiction. In the same manner here, the question being, prize or not prize, which is proper for the admiralty, though the title of *T.* commenced at land, yet that will not withdraw the suit from the admiralty. *2 Saund.* 254. *1 Sid.* 367. *Darnall* serjeant argued to *S. C.* *Carth.* 423. *Comb.* 462. *12 Mod.* 143. *Admiralty.* *Rex v. Broome,* 1 *Salk.* 32.

to the same effect; and farther, that *T.* comes too late after sentence, 1 *Cro.* 97. For after sentence and appeal a prohibition shall not be granted, unless it appears in the body of the libel that the matter of the suit is not within their jurisdiction. 2 *Roll. Abr.* 318, 319.

The plea will not aid an ill libel.

2 *Saund.* 259.

Prohibition, at what time.

Holt chief justice, It is not alleged in the libel, that the capture was *super altum mare*; so that nothing appears, to give jurisdiction to the admiralty. For a man shall not sue in the admiralty, only because it is a ship. It appears by the plea, to be matter proper for the admiralty; but that alone will not give them jurisdiction; for if the admiralty has not consuance of the original cause, but something arises upon it which is within their jurisdiction, that will not give them jurisdiction over the principal. But *e contra*, when the principal is within their jurisdiction, and an incident happens triable at common law, &c. And the reason of this is, because the common law is the over-ruling jurisdiction in this realm; and you ought to intitle yourselves well, to draw a thing out of the jurisdiction of it. In the case of *Radley v. Eglesfield* the capture was alleged in the libel to be *super altum mare*; in the same manner in *Broome's* case. Now this libel is no more than a replevin, and the matter of this plea might have been a good justification in trespass. As to the matter of the time of the motion, the common difference is, if the cause belongs to the courts of the civil law, and a man sues in an inferior diocese, where the consuance of the cause belongs to the metropolitan, and the defendant acquiesces in it, and admits the jurisdiction, and sentence is given, he shall not resort afterwards to the superior court. But if it appears that the spiritual court has no jurisdiction, no admittance whatsoever shall stop the prohibition. *Holt* chief justice and *Rokeby* were of opinion, that a prohibition ought to be granted; but *Turton* and *Eyre* justices *contra*; because it was after sentence and great expenses in the admiralty; and because now upon the whole proceedings it appears, that the admiralty has jurisdiction, the defect of the libel being aided by the defendant's plea. Therefore because the court was divided, no prohibition could be granted.

Courtney vers. Collet.

S. C. Carth. 436.

1 *Stra.* 635.

Case and trespass cannot be joined.

Bro. trespass, p. 112.

T Respafs *quare clausum* of the plaintiff called *B. fregit, et herbam ibidem crescentem pedibus ambulando conculcavit et consumpsit, et piscatus fuit in separali piscaria, necnon quare postea, viz. eodem die et anno* the defendant threw down a certain wear, *per quod aqua ab eadem cataracta decurrens piscariam ipsius* the plaintiff *ibidem in tantum inundavit, quod per cursum aquae illius,* et

et inundationem praedictam, pisces in eadem piscaria tunc existentes Jenk. 24.
ad valentiam *exiverunt, &c.* Upon not guilty pleaded, P. 46.
 verdict for the plaintiff, and intire damages were given. Gould 3 H. 6 53.
 King's serjeant moved in arrest of judgment, that the plaintiff has 11 Affs 13.
 joined an action of trespass, and an action upon the case, which Jenk. 211. pl.
 cannot be joined. 2 Roll. Rep. 139, 140. *Dawtry vers. Dea*, for 46.
 the former part of the declaration is a plain trespass, but the latter Allen 9.
 is only case. For if *A.* breaks the fences of *B.* *per quod* the cattle Sty. 43.
 of *C.* escape into *B.*'s land; case lies for *C.* against *A.* if the cattle 12 Mod. 164.
 of *C.* are distrained for escaping and *damage feasant* in *B.*'s land. For breaking
 And in this case the plaintiff does not say, that the defendant broke fences, *per*
 his wears, but they might be some other person's; and in fact they *quod* my cattle
 were the defendant's own wears, and therefore trespass does not lie escape and are
 for it, but case, for the consequential damage to the plaintiff. distrained.
 And therefore the case differs from the case of *Drake v. Cooper*, where Drake v.
 in trespass for breaking the plaintiff's close, containing one hundred Cooper,
 acres, upon which a fair used to be held every *Michaelmas* day, and Carth. 113.
 for throwing down booths and stalls *ibidem erecta, per quod* the
 plaintiff lost the benefit of his pickage; after verdict for the plaintiff,
 upon motion in arrest of judgment, the court were of opinion,
 that this was an intire trespass, because the booths appeared to be
 erected upon the plaintiff's land, and therefore intended to be his.
 But in the present case the wears do not appear to be upon the
 plaintiff's land, and therefore different. And Hil. 25 & 26 Car. 2.
B. R. rot. 700. between *Robinson* and *Bailey*, *Robinson* brought an Robinson v.
 action for battery of his servant, *per quod servitium amisit*, and for Bailey, 3 Keb.
 taking of nine pound of butter; and upon not guilty pleaded, and 331.
 verdict for the plaintiff, it was held by the court, that the one was
 case, and the other trespass, and therefore they could not be joined.
 But it was argued by Mr. *Cartbew* for the plaintiff, that if it should
 be admitted that this was but case, yet it being laid for a malfea-
 lance, it might be laid with *vi et armis*, and therefore may be joined
 with a plain trespass. But, 2. (by him) this latter part of the
 declaration is but bare trespass; and for this he cited Reg. 97.
 12 Hen. 4. 3. *Fitzb. N. Br. 89. m.* where it is said, if a man fills
 a ditch with dung, &c. by which the water used to have its course,
per quod another man's land is surrounded, he shall have trespass
vi et armis. And Reg. 95. a, b. *Fitzb. N. B. 87 l.* the very
 precedent from which this declaration was drawn. And as to the
 former point, after two arguments at bar, the court was of opi-
 nion, that trespass, and trespass upon the case, were two distinct Trespass.
 things of different natures; and although if *vi et armis* is put in
 trespass upon the case for malfeasance, this will not vitiate; yet
 the judgments in trespass and case are different. For in trespass
 always the judgment is, *quod capiatur*; but in trespass upon the Judgment.
 case, though *vi et armis* be inserted, yet the judgment is, *quod sit*
 in

in misericordia; and actions can never be joined, which have different judgments. But as to the second point, it seemed to the court, that this was a plain trespass; for the causing a superfluity of water to drown or overflow the land or fishery of the plaintiff, is a plain trespass, and the *per quod* the fish escaped is but in aggravation of damages. And therefore the whole court was of opinion for the plaintiff. *Sed adjournatur*. Note, that Holt chief justice said in this case, that if *A.* brings an action against *B.* for battery of *A.*'s servant, *per quod servitium amisit*, it is a plain action of trespass.

Green vers. Watts.

Record pleaded and afterwards annulled.

See Carth.

513.

12 Mod. 351.

Et Post. 550.

PER Holt chief justice, if the defendant pleads an action depending in another court for the same cause in abatement, and *mul tiel record* is pleaded; if there was such record at the time of the pleading of the plea, though the action was afterwards discontinued, yet the plea is good, because it was true at the time of the pleading. But if a man pleads a recovery by judgment in bar of an action, and the said judgment is reversed after the pleading of the plea, now the plea is ill, because now it is no such record *ab initio*.

Mich.

Mich. Term

9 Will. 3. C. B. 1697.

Sir George Treby Chief Justice.

Sir Edward Nevill

Sir John Powell

Sir John Blencowe removed this term out of Justices.
the Exchequer in the
room of Sir John Powell
deceased

Arnold *vers.* Jeffreson.

S. C. 2 Salk.

654.

Trover de scripto suo obligatorio

brought by the obligor.

1 Ro. Abr. 5.

K. p. 3.

Cro. El. 723.

p. 54.

Cro. Jac. 637.

p. 7.

Cro. Car.

262. p. 8.

Goldf. 89, 90.

2 Bulst. 313.

Mich. 3 Ed. 3.

30. pl. 1.

Trover de scripto suo obligatorio. The plaintiff declares, that he and J. S. were bound by this obligation jointly and severally to R. F. that the plaintiff was possessed of this, and that he lost it, and that the defendant found and converted it, &c. Not guilty pleaded. Verdict for the plaintiff. And now it was objected, that though the obligee might bring *trover* for this bond *ut de scripto suo obligatorio*, yet it could not be *scriptum obligatorium* to a stranger; therefore the plaintiff could not bring *trover* in this manner. For though it be supposed that the bond was given to the plaintiff, yet nothing passed to him but the material part, viz. the paper, &c. but the *lien* and right of action continued undisposed in the obligee. But it was admitted, that the plaintiff might have had trespass, because that might be maintained upon the bare possession. But *trover* will not lie without property, therefore the plaintiff has mistaken his action. At least, if it should be admitted, that *trover* would lie, yet the plaintiff has not brought his action well, because this

this could not be *scriptum suum obligatorium*, since it appears of his own shewing, that it was the bond of R. F. But to this it was answered, and resolved by the court, 1. That *trover* and conversion will lie upon a special property, as in case of a carrier. 2. That any stranger may maintain *trover* for a bond upon a special property by bailment, as well as the obligee himself. 3. That a stranger may not only bring *trover*, but also *ut de scripto suo obligatorio*, as well as the obligee himself, because the *scriptum suum obligatorium* is not inserted, to declare that the defendant has converted the duty or *chose en action* which belonged to the plaintiff, but to shew what sort of deed it is, which is converted; for *per Treby* chief justice it is admitted, that the obligee might bring *trover pro scripto suo obligatorio*, but in that case the *trover* is not of the right of action, which is a thing invisible, but it is of the material part of the deed; and therefore these words are used, to intimate what sort of deed is converted. 4. After verdict, that the court would intend, that the bond was given to the plaintiff. And in truth the fact was so, for the plaintiff was forced to pay the money, whereupon the bond was given to him.

Verdict aids.

Shalmer *vers.* Pulteney.

S. C. Lutw.
1586.
2 Inst. 405.

Venue intended.

THE plaintiff brought *quod permittat* against the defendant, to permit him *prostrernere quaedam aedificia* raised within fifty years upon the freehold of the defendant's husband, and now since the death of her husband her freehold, to the nuisance of the plaintiff. And the plaintiff shews, that Sir William Pulteney was seised in fee of three mesuages in *St. Martins in the fields* in *Middlesex*, to which a void piece of ground was contiguously adjoining; and that Sir William Pulteney granted these mesuages to the plaintiff; and that he and all those whose estate he hath in the said three mesuages time whereof, &c. have had and have used to have eleven windows towards the said piece of ground; that 1 June 4 Jac. 2. *Gervase Hulker* lessee for years of the defendant's husband raised certain edifices upon the said void piece of ground, which stopped the lights of the plaintiff; that this piece of ground came to the defendant after the death of her husband; and that the defendant would not permit the plaintiff to throw down these buildings, though she was oftentimes requested. The defendant pleaded in abatement, that there is no such writ of *quod permittat* in the *Register*, as this which the plaintiff hath brought. The plaintiff demurred. And the first exception was, that no parish nor *lieu conus* is alleged, in which these edifices supposed to be built lie. See 9 Co. 58, a. But to this the court answered, that they shall be intended to lie in the same parish where the three mesuages

mesuages lie, because they are said to be contiguously adjoining. The second exception was, that the writs in *Fitzb. Nat. Br.* 124. b. are, *post primam transfretationem, &c.* but this writ is, *infra quinquaginta annos*. But to this the court answered, that it is well enough, for now the time of limitation is altered. Third exception *per Wright* was, that the Register allows a writ of *quod permittat* against the person who levied the nuisance, his heir or feoffee; but in this case the defendant does not claim under him who levied the nuisance. But to this *Levinz* serjeant answered, that if *A.* levies a nuisance upon my land, if I continue it, *quod permittat* lies against me, for the prejudice to the plaintiff is the same. And to this the court agreed. *Fitz. Nat. Br.* 124. e. Fourth exception was, that the word *quaedam* was a word too general. But to this the court answered, that it has been allowed before, and therefore it is well enough. *Hearne's pleader* 643, 646. 2 *Ventr.* 186. *Warren v. Saintbill*, in the record, *quaedam fossa, &c.* Fifth exception was, that *quod permittat* will not lie *prostertere aedificium*; but *per Wright* the plaintiff ought to shew, what kind of edifice it is; for *praecipe quod reddat* will not lie *de quodam aedificio*, nor ejectment. Then here there ought to be as great certainty as in a *praecipe*, because the sheriff in this action must prostrate the nuisance, and totally take away the defendant's property. *Treby* chief justice said, that he wished, that to allow this might not be of ill consequence; for if it should be allowed, assizes or *quod permittat* for time to come would not be brought for any thing certainly specified by its proper name, by which the sheriff would be invested with an unlimited power in such executions. 2. He said, that there were resolutions almost in point against this, for it has been adjudged, that nuisance will not lie *de mole*, which (by him) seemed to be much less equivocal than the word *aedificium*. See *Noy* 68. 3 *Cro.* 402, 520. But notwithstanding that, he and the whole court were of opinion, that in this case the writ was good. 1. Because it might be, that there is a building or edifice, which hath not any certain appellation, and they would intend that it was so in this case. 2. Nuisance *de fabrica*, *Old Nat. Br.* 110. *Fitzb. Nat. Br.* 184. and consequently it will lie *de aedificio*, for the one is equally uncertain as the other. 3. In *quod permittat* the view is grantable, and it is not like ejectment or a *praecipe*, where the thing itself is demanded, and ought to be recovered. Therefore the court awarded *respondes ouster*. But note the court did not rely upon the reason of the view, for that might satisfy the jury, but was no direction to the sheriff. And *Powell* justice said, that there could not be any *Anglice* in a writ of right; and that in this action so much of the building as stops the lights ought to be abated, and no more.

Limitation of action.

Against whom *quod permittat* lies.*Quaedam.*

View.

Anglice.

Nuisance abated.

Blackett *vers.* Crissop.S. C. Lutw.
686.Bond taken by
a sheriff, to
make return
of cattle re-
plevied, good.Compl. sheriff
68. precedent
of such a
bond.

And. 267.

Pledges.

Scire facias a-
gainst pledges.A gage is not
a pledge with-
in Westm. 2.A bond is a
pledge.

DEBT upon bond. Upon *oyer*, it appears, that the condition was, that if the defendant *Crissop* should appear at the next county court, &c. and prosecute his action with effect against *J. S.* for wrongfully taking and detaining of his gelding, and should make return thereof if return should be adjudged, and save harmless the plaintiff *Blackett* sheriff of, &c. by the delivery of the said gelding, that then, &c. And upon this the defendant demurred. And it was argued, that this bond was void by the common law. For the sheriff had not power before the statute of *Westm. 2.* to take pledges, so that such bond taken before the statute of *Westm. 2.* had been without doubt void; and therefore it shall be void now, for the sheriff has no authority by the statute for this practice. See *Dalton* 434. *Latch* 51. 1 *Roll. Rep.* 314. But *per Holt* justice, there are two sorts of pledges, *plegii de prosequendo*, and *plegii de returno habendo*. The pledges of prosecuting were at common law, but those *de returno habendo* were appointed by *Westm. 2. cap. 2.* by which statute an action lies against the sheriff if he omits to take pledges, or if he takes those that are insufficient; for the party may have a *scire facias* against the pledges, where the suit is in any court of record. And though in the county court, &c. *scire facias* will not lie against the pledges, because these are not courts of record, and every *scire facias* ought to be grounded upon a record; yet there the party may have a precept in nature of a *scire facias* against the pledges. And this is the reason, why the sheriff cannot take gage instead of pledges. 1 *Cro.* 446. for the party has no remedy against the gage, as he hath against the pledges. And (by him and *Treby* chief justice) such a bond will answer the intent of the statute that requires pledges, for the obligors are sureties. And *plegii* in the old books signifies sureties. And this practice of taking bond instead of pledges is ancient usage. But (by them) the question will not be in this case, whether the sheriff can take a bond instead of pledges; as it would have been, if the party had brought an action against the sheriff, for not having taken pledges, and the sheriff had pleaded that he had taken this bond; but the question now is, whether this bond shall be void. And by the whole court the bond is not void. At common law it had been void, because it had been to save the sheriff harmless in making replevin by plaint, which he could not have done before the statute of *Marleb. cap. 21.* and also that the defendant should make return of the cattle, to do which the sheriff could not have taken pledges; and therefore he would have done what he ought to have done. But now

now it is the duty of the sheriff, to take pledges to make return, and also to replevy by plaint; therefore the bond is lawful. For by *Powell* justice, where the sheriff takes a bond or promise, to keep him harmless in the doing of a lawful act, the bond or promise is good; but if it be in the doing of that which he ought not to do, the bond or promise is void and against law.

Studholme vers. Mandell.

Intr. Trin. 9 Will. 3. Rot. 1942.



AN action of covenant was brought by the plaintiff upon covenants in an indenture, by which the plaintiff demised a mill to the defendant, and in which the defendant covenanted, to leave the mill stones in as good condition as he found them, or to pay to the plaintiff so much as they should be damaged; the damage to be estimated by *A.* and *B.* who viewed them when the defendant entered upon the premises. The plaintiff assigns for breach, that the defendant had left the mill stones damaged, and had not made satisfaction to the plaintiff. The defendant pleads, that *A.* and *B.* had not estimated the damage. The plaintiff demurs. And serjeant *Wright* for the defendant argued, that this was a condition disjunctive, and therefore the leaving of the mill stones damaged will not be a breach, because at the time of the covenant he had election, to perform the one or the other part; therefore (according to *Laughter's* case) without estimation by *A.* and *B.* of the damage of the mill stones, the defendant is excused from the performance; because it is impossible for him to make the adjudication, or to compel *A.* and *B.* to do it; and till that be done, the defendant cannot be liable; no more than if *A.* enters into bond, to perform the award of *B.* and *C.* and *B.* and *C.* will not make any award. Serjeant *Gould* contra. These covenants are part of the condition of the bond. And since the latter part of this disjunctive covenant is for the safety of the defendant, it belongs to him to procure this estimation, or otherwise he shall be liable. If the estimation ought to be made by such persons as the obligee should appoint, and the obligee had refused to appoint, this would have excused the defendant; because the performance of the covenant is rendered impossible by the act of the obligee. But in this case the fact is contrary. And of this opinion was the whole court, and they said, that the rule and reason of *Laughter's* case ought not to be taken so largely as *Coke* has reported it, but according to the nature of the case. And *Treby* chief justice put this case; *A.* in consideration of 100*l.* bound himself in a bond, with condition, either to make a lease for the life of the obligee

S. C. Lutw. 688.

Disjunctive covenants the one impossible to be performed.

Vide 1 Salk. 170.

5 Co. 21.

Who shall do the first act in covenant.

5 Co. 23. Lamb's case.

before such a day, or to pay him 100*l.* The obligor died before the day; yet in the time when *St. John* was chief justice of the Common Pleas, it was adjudged that the obligor should pay the 100*l.* and *St. John* then declared, that he knew well some of the judges who gave the resolution in *Laughter's* case, and that they denied that they laid down such a rule as *Coke* has reported; yet the whole court held, that the principal case of *Laughter* was good law. Judgment for the plaintiff. Note, this last case put by *Treby* seems to be undistinguishable in reason from *Laughter's* case.

Stanfill *vers.* Hickes.

Distress, upon
what estate.

Ante 170.

IN trespass the case was thus; *A.* made a lease for a year, and so *de anno in annum quamdiu ambabus partibus placuerit.* The lessee having occupied the land for two years and more, is distrained for rent due for the last year of the two years. And the question was, whether the distress was lawful. And *Girdler* serjeant argued, that it was all one intire interest arising from the same root; and that as the lease at will is derived from the same grant, so it is but a continuation of the interest first granted, and then the distress is lawful. But against this *Gould* serjeant argued, that this was but a lease for two years, and afterwards a lease at will. Then since the interests are different, the second estate cannot be answerable for the debts of the former estate, which was before determined. Of which opinion was the whole court, and for this reason it was adjudged, that the distress was unlawful.

Bellasis *vers.* Hester.

S. C. Lutw.

1589.

Carth. 171.

Hard. 485,

487.

Vent. 152.

Freem. 14.

p. 13.

2 Lutw. 1594.

Writ abates in
part.

A*ssumpsit* for 40*l.* The plaintiff declares upon a bill of exchange for 20*l.* payable ten days after sight, and that the bill was seen by the defendant and accepted the fifth of *May*; and then he shews another *assumpsit* for the other 20*l.* &c. The defendant craves oyer of the original, and upon that prays, that the writ may abate *quoad primam promissionem*, because the original bears *teste* the fifteenth of *May*, and the bill was not payable until ten days after sight; *et quoad alteram promissionem*, he pleads in bar without defense. The plaintiff demurs. It was argued by the defendant's council, that if the bill be payable ten days after sight, the day of sight shall be taken exclusive, as well by reason of the word *post*, as because it is always so understood among merchants. But the court was of opinion, 1. That in real actions the writ may abate in part, but in personal actions a writ cannot abate

abate in part. Therefore admitting that the day is excluded here, the writ must abate for the whole, or not at all. 2. That there is no fraction of a day in this case, but that it shall be intirely included or excluded in this case; for the law will never account by minutes or hours, to make priorities in a single day, unless it be to prevent a great mischief or inconvenience; as if a bond be made the first day of January, and this bond is released the same day, the bond may be averred to be made before the release. So if a *feme sole* bind herself in a bond, and the same day marries; one may aver, that she married after the bond delivered. In assise it appears that the disseisin was done the same day on which the writ was *teste*, yet this shall not abate the writ, because the assise might be purchased after the disseisin. 3. That if there is a custom among merchants, that the day of the fight shall be excluded, it ought to have been pleaded specially; for it is a special custom, of which the court cannot take knowledge without pleading. And *Powell* justice said, that the court would take notice of the *lex mercatoria*, as that there is no survivorship, or of a general custom, as gavelkind; but that such special custom as this here ought to be pleaded. As in an action upon a bill of exchange, unless the plaintiff declares upon a custom to support the *assumpsit* according to the common form, the action will not be maintainable. 4. *Powell* and *Newill* justices were of opinion, that the day in this case ought to be included, so that the day on which the bill was shewn shall be reckoned one of the ten. For according to *Clayton's* case, and all the books, when the computation is to be made from an act done, the day in which the act was done must be included; because since there is no fraction in a day, that act relates to the first moment of the day in which it was done, and was as if it were then done. But when the computation is to be from the day itself, and not from an act done, there the day in which the act was done must be excluded by the express words of the parties. As if a lease be made to commence *a die datus*, the day is excluded; but if it be *a confectiōne*, which is an act done, the day of the making shall be included. But *Treby* chief justice *contra* held, that if a bill be payable ten days after fight, the day of the fight cannot be accounted one of the ten days, but shall be excluded. 1. Because it may be seen the last minute of the day, and that may be intended as reasonably, as that it was seen the first minute. 2. The party may have the whole day to view the bill, and that is allowed him by the law. 3. Because the contrary construction seems absurd; for then if a bill be payable one day after fight, it must be paid the same day that it is seen, which is not the day after the fight, as the bill requires. As to *Clayton's* case, he admitted, that it was good law, but not contrary to his opinion; for if a man makes a lease the first of January, to have

Fraction in a day.
Barnard. Rep. 303.

Of what customs the court will take notice without pleading.
Ante 175.

Day included.
2 Vent. 308, 310.

Exception
cannot be ta-
ken to the de-
claration upon
a plea in a-
batement.

Plea without
defense is but
matter of
form.

and to hold a *confession* for a year, there the day of the making must be accounted one; because being a lease from the delivery, and to continue but for one year, unless the day be included, the lease will not determine until the end of the first of January the next year, and so there will be two first days of January in the one year. But notwithstanding his opinion, because his brethren were of a contrary opinion, he awarded, that the writ should stand, and that the defendant should answer over. Note, Before this opinion of the court was pronounced, the defendant's counsel offered to take exception to the declaration, but the court refused to admit them; for *per curiam* upon a plea to the writ, the defendant cannot take exceptions to the count, before the writ be adjudged good, for then the defendant has time enough to take advantage of the declaration; and before it is needless; because if the writ be abated, that will determine the whole. After this it was objected, that the defendant had not made defense, and the question was, if this was matter of form, and so aided by the general demurrer. And *prima facie* the court was of opinion, that this was matter of substance; because the defendant is not party to the action without defense; but after having consulted the judges of the King's Bench, where it has been a long time held matter of form, they agreed that it was aided by the general demurrer, though at the same time they seemed to comply with that opinion, rather than to approve it with their own judgments, to the end that there might be a conformity between the two courts.

Wells *vers.* Williams.

S. C. Lutw.

34, 35.

1 Salk. 46.

Fost. 186.

Alien enemy
commorant
hereby licence
of the king,
and under his
protection,
may maintain
debt upon a
bond, tho' he
did not come
with safe con-
duct.

Captive or
prisoner of
war.

Jew.

DEBT upon bond. The defendant pleads, that the plaintiff was an alien enemy born in France of French parents who were alien enemies, and that he came into England *sine salvo conductu*, and concludes in bar. The plaintiff replies, that at the time of the making of the bond he was, and yet is, here *per licentiam et sub protectione domini regis*. The defendant demurs. And Wright serjeant objected, that it appears that the plaintiff is an alien enemy, and came here *sine salvo conductu*. He admitted, that an alien enemy, who comes here with safe conduct, may maintain an action. But unless there is a safe conduct, though it be *per licentiam et protectionem*, he cannot maintain an action. For by the same reason a captive or prisoner of war may maintain an action. But to that it was answered and resolved, that the necessity of trade has mollified the too rigorous rules of the old law in their restraint and discouragement of aliens. A Jew may sue at this day, but heretofore he could not, for then they were looked upon as enemies. But now commerce has taught the world more humani-
ty.

cy. And as to the case in question, admit that the plaintiff came here before the war was proclaimed (for so it may be intended) then this action is maintainable, 1. Because there was no need of a safe conduct in time of peace. 2. Though the plaintiff came here since the war, yet if he has continued here by the King's leave and protection ever since, without molesting the government or being molested by it, he may be allowed to sue, for that is consequent to his being in protection. And Treby chief justice said, that wars at this day are not so implacable as heretofore, and therefore an alien enemy, who is here in protection, may sue his bond or contract; but an alien enemy abiding in his own country cannot sue here. And Dier 2. Moor 839. Bendl. and the other books ought to be understood so. Note, That Treby chief justice said in this case last Trinity term, that the King may declare war against one part of the subjects of a prince, and may except the other part. And so he has done in this war with France, for he has excepted in his declaration of war with France all the French protestants. And of such proclamations all ought to take notice, because the war begins only by the King's proclamation.

War declared.

The court will take notice of proclamations of war.

Elstob exec' of Jane Elstob *vers.* Thorowgood.

S. C. 1 Salk.

393.

Journeys accounts.

6 Rep. 10. a.

b.

1 Leon. 44.

57.

Cro. Jac. 218.

599.

Winch. 82.

Cro. Car. 254.

1 Lut. 297.

Administrator

*durante mino-**ritate. J. S.*

brings an action, J. S.

comes of age,

he cannot con-

tinue it by

journeys ac-

counts, *contra*

of executor

*durante mino-**ritate.*

Ndebitatus assumpsit for an *assumpsit* to the testatrix. The defendant pleads *non assumpsit infra sex annos*. The plaintiff replies, that Charles Elstob was executor to Jane Elstob *durante minoritate* of the plaintiff, and that he sued an action within six years, &c. against the defendant, and that pending the action, the plaintiff came of age, and brought this action by *journeys accounts*. The defendant demurs. And after several arguments at bar it was resolved by the court, 1. That if Charles Elstob had been administrator to Jane Elstob *durante minoritate* of the plaintiff, and had brought an action, pending which the plaintiff had come of age; he could not have continued that by *journeys accounts*, because he would not have come in, in privity to Charles, but he had claimed immediately from the ordinary; and in such case the statute of limitations would have been a bar to the plaintiff, as it was adjudged in a case in this court about four years ago; where an administrator brought an action upon the brink of the six years, and pending that died, upon which the next administrator *de bonis non* brought another action, in which the statute of limitations being pleaded, the plaintiff replied and shewed all the special matter, how the former administrator brought an action, &c. and it was adjudged, that that could not aid him, because he did not come in in privity of the former administrator. 2. That this action was recently enough brought, for it appears, that it was brought within seven days after the

The court re-
tracted their
opinion in this
case afterwards
Hil. 10 Will.
3. C. B. be-
tween Kenney
v. Hayward.

Want of aver-
ment that the
debt was not
paid.

See 1 Vent.
119.
Hornsey v.
Dimock.

the plaintiff came of age. Heretofore they used to allow half a year to bring an action by *journeys accounts*, but now that is held to be too long, and therefore they allow but thirty days. 3. That this executorship being but an office, both persons make but one executor, and therefore the plaintiff is privy to *Charles*, and to the writ sued by him. See *Owen* 134. *Co. Entr.* 623. *Gouldsbor.* 136. *Hob.* 265. 1 *Roll. Abr.* 921. *Moor n.* 648. And by *Treby* chief justice, if *Charles* had obtained judgment, the new plaintiff after his being of age might have sued execution. But it was resolved, that if *A.* makes *B.* his executor, adding that if he does such an act *C.* shall be his executor; if *B.* brings an action, and then does the act, *C.* cannot have an action by *journeys accounts*, &c. because *B.* has determined his office by his own act; and though he was once sole and perfect executor of himself, yet by the breach of the condition he is now as if he had never been executor, and *C.* is not privy to him. But then serjeant *Wright* took exception to the declaration, that the plaintiff has said, that the debt was not paid to him, but does not say that it was not paid to *Charles* *Elstob* the executor *durante minori aetate*. And per *Treby* chief justice there was a case here lately, where *A.* brought an action of debt in right of his wife due to her before coverture, and he said that the debt was not paid to the wife, but did not say that it was not paid to him *post desponsalia*; and upon demurrer it was adjudged ill, though it had been good after a verdict. But I think, that upon reading the record in the principal case, it was averred as it should be, and that the plaintiff had judgment.

Wingfield *vers.* Jefferys.

Exchequer Chamber.

Certainty.

AN information was exhibited in the court of Exchequer against *Wingfield*, for selling live cattle, or causing them to be sold, &c. Judgment in the Exchequer for the informer. And error brought here, and assigned that the information was uncertain, because in the disjunctive. And *Holt* chief justice inclined that it was ill for this reason. But upon certificate by the barons that the course was so in the Exchequer, and since the jury had found the defendant guilty as to one, judgment was affirmed.

Ellis

Ellis *vers.* Thomas.

Exchequer Chamber.

DENIAL of imparlance was generally assigned for error. 8. C. 3 Salk.
And, *per Holt* chief justice, if it appear upon the record, ^{186.} Error assign-
that the defendant has title to an imparlance, and he prays it, and ed.
it is denied him, it is error. But if no such thing appear upon the
record, denial of an imparlance cannot be assigned for error.
Judgment was affirmed.

4 D

Hilary

Hilary Term

9 Will. 3. B. R. 1697.

Sir John Holt Chief Justice.

Sir Thomas Rokeby

Sir John Turton

Sir Samuel Eyre

} Justices.

Meggot assignee of the commissioners of Bankrupt of
Wilson *vers.* Mills et al'. Trover.

S. C. Cases in
B. R. 159.
12 Mod. 159.
March 34.
p. 67.
Jo. 437. P. 3.
Cro. Car. 548.

THE case was thus. *Wilson* exercised the trade of a victualler, during which time the plaintiff *Meggot* being a brewer furnished *Wilson* with ale, by which *Wilson* contracted a great debt with *Meggot*. Afterwards *Wilson* quitted the trade of a victualler, and exercised the trade of an inn-keeper, and borrowed money of the defendant *Mills* (being *Wilson*'s lessor) to buy goods to furnish his house; and for security of the money *Wilson* made a bill of sale of the goods to *Mills*, but *Wilson* kept the possession of them. After *Wilson* was become an inn-keeper the plaintiff *Meggot* continued to sell him drink, for which *Wilson* was indebted to *Meggot* as before. Afterwards *Wilson* not being able to continue his trade, makes an agreement with the defendant *Mills*, to give him security for his money by a new bill of sale of the same goods and others. But before he executes the new bill of sale, by contrivance with the plaintiff he commits an act of bankruptcy. The defendant *Mills*, not knowing of the trick accepts the new bill of sale. The plaintiff *Meggot* sues a commission of bankruptcy against *Wilson*, and obtains an assignment from the commissioners, and thereupon brings *trover* against the defendant *Mills* for these goods. It appeared farther upon the evidence, that *Wilson* had paid to *Meggot* the plaintiff several sums of money after he became an inn-keeper, amounting to as much

much as the debt was, which he owed to the plaintiff, when he ^{3 Co 81.} quitted the trade of a victualler; but when he paid them, he did ^{Twine's case.} not express upon what account. And *per Holt* chief justice, 1. If ^{Fried.} these goods of *Wilson's* had been assigned to any other creditor, the keeping of the possession of them had made the bill of sale fraudulent as to the other creditors. But since the original agreement was thus, and that honestly and really made for securing the money of the Defendant *Mills*, which he had lent to *Wilson* for this purpose, ^{2 Buller. 226.} the agreement was good and honest. 2. *Per Holt* chief justice, ^{Bankrupt, who may be so.} though an inn-keeper cannot be a bankrupt (For this see the case of *Newton v. Trigge*, adjudged *Trin. 3 Will. & Mar. B. R. Intr.* ^{Newton v. Trigge, Carth. 149. S. C. 3 Mod. 327.} *Mich. 1 Jac. 2. B. R. rot. 226.* in *trover* the jury find a special verdict, that an inn-keeper bought goods for the use of his guests, and sold them to his guests; and the question was, whether the inn-keeper by this was a bankrupt? and adjudged by the whole court that he was not, because the trade was not at large, but confined *hospitantibus*, and is properly the accommodation of his guests; and it was agreed in that case, that farmers are not within the statutes of bankrupts; it was also found in that case, that the inn-keeper had a share in a stage-coach, but that was not regarded; see *1 Cro. 91. Hatton 42.*) though an inn-keeper cannot be a bankrupt, yet a victualler may; and tho' a man quits his trade, yet he may ^{1 Ventr. 5.} be a bankrupt for the debts that he owed before. And though a man who has become creditor to him after the quitting of his trade cannot ^{For what debts.} sue a commission of bankrupts for such debts contracted after, yet if the old creditors sue a commission of bankrupts, this new creditor ^{Commission sued, by whom.} shall be admitted to have his share of the bankrupt's estate. 3. *Per Holt* chief justice, if *A.* being a trader becomes indebted to *B.* in 100*l.* and then he quits his trade and afterwards becomes indebted to *B.* in 100*l.* more, and afterwards *A.* pays to *B.* 100*l.* not expressing upon what account; since so much in quantity is paid to *B.* ^{General act of payment.} as was due to him from *A.* when *A.* was capable of being a bankrupt, it would be too rigorous, to admit *B.* to sue a commission of bankrupts for the old debt of 100*l.* But to this point he said, that he would not give an absolute opinion. Note; all this that *Holt* chief justice said, was not contradicted by any of the other judges. This was said upon motion for a new trial of this cause, which was tried before *Holt* chief justice at *nisi prius*.

Jones *vers.* Morley. *1. 1. 12. Mod.*

S. C. Cases in Parl. 140. 4 Mod. 261. 2 Salk. 677. Carth. 410. Farr. 76. Comb. 429. S. C. Parl. Cases 143. and Cart. 5.

Ejectment for the manor of *Frensham* in *Surrey*. Special verdict, that *Anne Bowyer* being seised in fee of the said manor in question, by deeds of lease and release, bearing date the 22 & 23 July 1664, conveyed the said manor to Sir *William Morley* and *Watts*

3 Bull. 251.
Cro. Ja. 29,
512.
5 Rep. 26. b.
2 Rep. 1.
2 And. 78,
46.
Mo. 107.
Clayt. 51.
Cro. Ja. 510,
512.

and their heirs, in consideration of a marriage to be solemnized between the said *Anne Bowyer* and *Edward Morley* son and heir to the said Sir *William Morley*, to the use of the said *Anne Bowyer* and her heirs, until *Edward Morley* should settle a jointure upon her of 300*l. per annum ultra reprises*; and from and after such settlement of a jointure, to the use of *Edward Morley* and his heirs; provided that if *Edward Morley* should not make such settlement of jointure before the *Easter* term next following, that then the use limited to *Edward Morley* and his heirs should cease; the jury find, that no settlement of jointure was made by *Edward Morley* within the time limited, so that no use (though the marriage took effect) arose by that deed to *Edward Morley* and his heirs; afterwards *Edward Morley* and *Anne* his then wife, by their deed bearing date the 24th of *January* 1665, between the said *Edward Morley* and *Anne* his wife of the one part, and *Richard Young* and *John Truster* of the other part, reciting that a fine was agreed to be levied *Hilary* term next following, between *Richard Young* and *John Truster* complainants, and *Edward Morley* and *Anne* his wife deforcients, declared that the use of that fine should be to *Edward Morley* and his heirs; afterwards and before the fine levied, by writing indented bearing date the 31st of *January* 1665, between *Edward Morley* of the one part, and *Anne* his wife of the other, in consideration of the said marriage it was agreed between them, that all preceeding conveyances, grants, bargains and sales, agreements, &c. made concerning the manor of *Frensham*, with any person or persons whatsoever, should be revoked, until *Edward Morley* should perform the articles of marriage in the deed of the 23d of *July* 1664. and that if *Edward Morley* should not settle 300*l. per annum ultra reprises* for the jointure of the said *Anne* according to the agreement in 1664, then he covenants that it shall be lawful for *Anne* and her heirs to enter, &c. The last return of *Hilary* term 1665 a fine was levied, but no jointure of 300*l. per annum* was settled; but afterwards a jointure of 250*l. per annum* was settled, charged with 15*l. per annum* rent-charge; the 10th of *July* 1666 *Edward Morley* mortgages this manor of *Frensham* in fee (under which the defendant claims) and afterwards in 1667 *Edward Morley* died, and *Anne* survived him, and entred into the land allotted for her jointure, and enjoyed it during her life; in 1679 *Anne* died, leaving *H. Bellinger* the lessor of the plaintiff her next heir, and then under the age of 21 years. And the general question in this case was, whether the fine levied in *Hilary* term 1665 was to the use of *Edward Morley* and his heirs, or to the use of *Anne* his wife and her heirs. And the case was of ten argued at bar. And now *Holt* chief justice pronounced the resolution of the whole court. And, 1. he said, that there is an uncertainty upon the special verdict how the possession hath been, so that it may be a question,

question, whether the lessor of the plaintiff is not barred by the statute of limitations of this action; for if *Anne* was out of possession in 1667. when her husband *Edward Morley* died, then the statute of limitations took place from that time, and so the plaintiff might be within the statute; but that is not found by the jury expressly, and the statute of limitations shall not be taken by construction, to bar a man of his action, unless it be expressly found how the possession hath been. Statute of limitations.
Never taken by construction.

Then this case depends upon the operation of the two writings; and the whole court was of opinion, that the fine was not to the use of the deed of the 29th of *January*, but that this deed was controlled by the writing dated the 31st of *January*; to prove which *Holt* chief justice premised three things.

1. That if it be covenanted by deed, to levy a fine of lands, &c. Uses of a fine, &c. to such persons and uses, and the fine be levied pursuant to the deed; no proof whatsoever by *parol* shall be admitted, to evince, that this fine was levied to other uses, than those that are contained in the deed. But a subsequent deed may alter the uses of the fine, though a *parol* agreement (as this writing between husband and wife is not a deed, but amounts to a *parol* declaration) cannot. But if there is a variance between the deed and the fine in any circumstance, then the parties may aver the fine to be levied to other uses. 2 Co. 76. Lord *Cromwell's* case, 5 Co. 26. a. Earl of *Rutland's* case.

2. Though there is a variance between the deed and the fine, yet if nothing appears to the contrary, the fine shall be taken to be to the uses of the deed; and in that case the deed is not only evidence of the uses, but the fine is by construction of law to the uses of the deed. 5 Co. 26. b.

3. If this fine had agreed with the deed, the uses limited by the deed could not have been controuled by the writing of the 31st of *January*; because though the deed of a *feme covert* is not valid in law, yet the deed having relation to the fine, takes validity from thence, and will conclude her. Therefore infancy cannot be alleged against a deed which leads the uses of a fine, so long as the fine continues in force, because the deed is supported by the fine. The same law of coverture. Deed of a feme covert supported by a fine.

These things being premised, it follows that this fine cannot be to the use of the deed of the 29th of *January*; because the fine to be levied by the deed of the 29th ought to have been levied the *Hilary* term next following, exclusive of that *Hilary* term in which

Estoppel.

which the deed was made, but this fine was levied the same *Hilary* term in which the deed was made, and therefore there was a variance between the fine and the deed, and consequently room left for averment. For if there is room for averment, where a fine is levied of a time after, there is as much reason to admit it, where a fine is levied of a time before. For in both cases the fine varies from the fine agreed to be levied by the deed. There is the same room for averment, where the declaration of uses is by deed subsequent to the levying of the fine. 9 Co. 7. *Dowman's case*. The only difference is, where the uses of a fine or recovery precedent are declared by a deed subsequent, the conusor and his heirs, or any claiming under him, are estopped to say, that the fine was to the use of the conusor and his heirs, &c. but a stranger shall not be estopped to say that. But in case of a fine varying from a precedent deed, no person is estopped, to aver against the deed, that the fine was to other uses. Then in this case since there is a variance between the fine and the deed, it is reason that the wife should avoid it. For if the deed had been pursued, she would have had twelve months to see whether the husband would perform the marriage agreement; and if he would not, she might have refused to join in levying the fine; of which benefit she was deprived by the immediate levying of the fine. Then the husband by the writing of the 31st of *January* agrees to give her the terms of her marriage agreement. And accordingly the fine was levied. From whence it appears manifestly, that the agreement contained in the deed of the 29th was relinquished, and the new agreement was designed to lead the uses of the fine.

Uses of a fine
or recovery
declared.

2. This writing of the 31st of *January* (by the whole court) is a sufficient declaration of the uses of the fine. And to prove this, *Holt* chief justice said, that there are several ways to declare uses, either upon transmutation of the possession, or without it. If there is a transmutation of the possession, as by fine, feoffment, or recovery, the declaration will be sufficient without consideration or deed. But if there is no transmutation of possession, then there must be some obligatory agreement, or valuable consideration; because the use depending intirely upon equity, the chancellor will not compel performance, where there is no transmutation of possession, unless there is a valuable consideration, or binding agreement. Bargain and sale will raise a use upon payment of money. But consideration of blood will not raise a use without deed. *Moore* 687. *Callard v. Callard*. 2. This writing of the 31st is sufficient, to declare the uses of this fine. It is not absolutely necessary to make use of the word use in the declaration of uses of a fine, for any kind of agreement which manifestly shews the intent of the parties will be sufficient. An use is defined, in *Chudleigh's case*, a
meer

meer equitable interest, where one has the estate in the lands, and another takes the profits. The invention of them was of late ^{Invention of} time, and the cause of the invention was to avoid the statute of ^{uses.} mortmain. 2 Leon. 14. Uses only affected the consciences of the feoffees to the uses, then the clergy having power over the consciences of men, and sitting in chancery until the time of Henry the Eighth, compelled men to perform their agreements. These uses were kept secret, until they were discovered in the contentions between the houses of *Lancaster* and *York*; at which time they were found very beneficial, to save mens estates from escheats; and were tolerated by both parties for the common convenience; so that the greatest part of the estates in *England* were conveyed to uses. And in the reports of the time of *Edward* the Fourth there are more of them mentioned than at any time before; and so being generally used, they were licked into form, and became the common conveyance. If an agreement is, that *A.* for so much money paid shall have the land, this will raise an use. 8 Co. 93. *Foxe's case.* See 1 Ventr. 137. *Crossing v. Scudamore.* If *A.* bargains and sells to *B.* and his heirs, and the deed is not inrolled, or if a deed of feoffment is not executed by livery; if a fine be levied between the same parties, the deed of bargain and sale, or deed of feoffment, will declare the uses of the fine. Now there is here an agreement between the husband and wife, that the husband shall have the land to him and his heirs, if he make to the wife a jointure of more than 300 *l. per annum*, this agreement will well enough declare the uses of the fine levied.

3. If this writing of the 31st of *January* is not a good original ^{Uses con-} declaration of the uses of the fine, yet it will be sufficient to con- ^{trolled.} trol the deed of the 29th of *January*, for by that it is agreed, that all deeds, conveyances, &c. made in contradiction to the marriage agreement should be null and void. Now a *parol* declaration of the intent of the parties will be sufficient to hinder any use from arising by the former deed, where the former deed varies from the fine. Then if no use can arise according to the deed of the 29th, then there is here a fine levied, and the use by operation of law is to the wife and her heirs, and then judgment ought to be given for the plaintiff. And judgment for these reasons was given by the whole court for the plaintiff, and upon error brought in parliament was affirmed there.

Rex

Rex et Regina v. episcopum Cestr. Piers & Scroope.

Error. C. B. Quare impedit. Rot. 705, 706.

S. C. Cases in
parl. 212.
2 Salk. 560.
Carth. 440.
5 Mod. 297.
Skin. 651.

Queen Elizabeth
seised
in gross of the
advowson of
the church of
Bedall,

14 Feb. 12
regni present-
ed Tymes by her
letters patents,
Prout patet by
the inolment
of the letters
patent in
Chancery;
who was ad-
mitted, &c.

The queen
died seised of
the advowson;
by which it
descended to
James I. who
was seised in
gross.

The church
became void
by the death
of Tymes.

James I.
13 July
19 regni,
presented
John Wilson;

Placita irrotulata coram Georgio Treby milite et sociis suis iusticiariis domini regis et dominae reginae de termino sancti Michaelis anno regni dicti domini regis et dictae dominae reginae dei gratia Angliae, &c. sexto. Ebor. ff. Nicolaus episcopus Cestriensis Richardus Piers armiger, et Richardus Scroope clericus summoniti fuerunt ad respondendum domino regi et dominae reginae nunc de placito quod permittant ipsos dominum regem et dominam reginam praesentare idoneam personam ecclesiae de Bedall quae vacat et suam spectat donationem, &c. et unde Edwardus Ward miles attornatus dictorum domini regis et dominae reginae nunc generalis qui pro eisdem domino rege et domina regina in hac parte sequitur pro praedictis domino rege et domina regina dicit, quod domina Elizabetha nuper regina Angliae fuit seista de advocatione ecclesiae praedictae ut de uno grosso per se ut de feodo et jure in jure coronae suae Angliae, et sic inde seista existens ad ecclesiam illam vacantem per literas suas patentes sub magno sigillo suo Angliae sigillatas gerentes datum apud Westmonasterium in comitatu Middlesexiae decimo quarto die Februarii anno regni ejusdem nuper reginae duodecimo praesentavit quendam Johannem Tymes clericum suum prout per recordum irrotulamenti dictarum literarum patentium in curia cancellariae dictorum domini regis et dominae reginae nunc apud Westmonasterium praedictum remanens plenius apparet, qui quidem Johannes Tymes ad praedictam praesentationem praefatae nuper reginae fuit admissus institutus et inductus in eadem tempore pacis tempore dictae nuper reginae, praedictaque nuper regina de advocatione ecclesiae praedictae ut praefertur seista existente, eadem nuper regina postea apud Westmonasterium praedictum de tali statu suo de et in advocatione ecclesiae praedictae ut praefertur seista obiit, post cujus quidem nuper reginae mortem advocatio ecclesiae praedictae descendebat Jacobo nuper regi Angliae primo, per quod praedictus nuper rex Jacobus primus fuit seistus de advocatione ecclesiae praedictae ut de uno grosso per se ut de feodo et jure in jure coronae suae Angliae, et sic inde seisto existente, ecclesia praedicta vacavit per mortem praedicti Johannes Tymes, per quod idem nuper rex Jacobus primus ad ecclesiam illam sic vacantem per literas suas patentes sub magno sigillo suo Angliae sigillatas gerentes datum apud Westmonasterium praedictum decimo tertio die Julii anno regni ejusdem nuper regis Jacobi primi Angliae, &c. decimo nono praesentavit quendam Johannem Wilson sacrae theologiae professorem clericum suum, prout per recordum irrotulamenti dictarum literarum patentium ultimo mentionatarum

tarum in praedicta curia cancellariae dictorum domini regis et domi-
 nae reginae nunc apud Westmonasterium praedictum remanens plu-
 nius apparet, qui quidem Johannes Wilson ad praedictam praesenta-
 tionem praefati nuper regis Jacobi primi fuit admissus institutus et
 inductus in eadem tempore pacis tempore dicti nuper regis Jacobi
 primi, praedictoque nuper rege Jacobo primo de advocatione eccle-
 siae praedictae ut praefertur seifito existente, idem nuper rex postea
 apud Westmonasterium praedictum de tali statu suo inde seifitus obiit,
 post cujus quidem nuper regis Jacobi primi mortem advocatio eccle-
 siae praedictae descendebat Carolo nuper regi Angliae primo ut filio
 et haeredi praedicti nuper regis Jacobi primi, per quod praedictus
 nuper rex Carolus primus fuit seifitus de advocatione ecclesiae prae-
 dictae ut de uno grosso per se ut de feodo et jure in jure coronae suae
 Angliae, et sic inde seifito existente, ecclesia praedicta vacavit per
 mortem praedicti Johannis Wilson, per quod idem nuper rex Carolus
 primus ad ecclesiam illam sic vacantem per literas suas patentes sub
 magno sigillo suo Angliae sigillatas gerentes datum apud Westmonaste-
 rium sexto die Martii anno regni ejusdem nuper regis Caroli primi
 decimo praesentavit quendam Henricum Wickham sacrae theologiae
 professorem clericum suum, prout per recordum irrotulamenti dictarum
 literarum patantium ultimo mentionatarum in praedicta curia cancel-
 lariae dictorum domini regis et dominae reginae nunc apud Westmona-
 sterium remanens plenius apparet, qui quidem Henricus Wickham ad
 praedictam praesentationem praefati nuper regis Caroli primi fuit
 admissus institutus et inductus in eadem tempore pacis tempore dicti
 nuper regis Caroli primi, praedictoque nuper rege Carolo primo de
 advocatione ecclesiae praedictae ut praefertur seifito existente, eccle-
 sia praedicta vacavit per mortem praedicti Henrici Wickham, quod-
 que quidam Johannes Piers armiger ad eandem ecclesiam sic vacantem,
 jus praesentandi non habens ad eandem, sed usurpando super dominum
 nuper regem Carolum primum, praesentavit quendam Willelmum Met-
 calfe clericum suum, qui ad praesentationem praedicti Johannis Piers
 fuit admissus institutus et inductus in eadem, posteaque praedictus nuper
 rex Carolus primus de advocatione ecclesiae praedictae ut praefertur sei-
 fitus existens apud Westmonasterium praedictum de tali statu suo inde ut
 praefertur seifitus obiit, post cujus mortem advocatio ecclesiae prae-
 dictae descendebat Carolo nuper regi Angliae secundo ut filio et haeredi
 praedicti nuper regis Caroli primi, per quod praedictus nuper rex
 Carolus secundus seifitus fuit de advocatione ecclesiae praedictae ut de
 uno grosso per se ut de feodo et jure in jure coronae suae Angliae, et
 sic inde seifito existente, ecclesia praedicta vacavit per mortem prae-
 dicti Willelmi Metcalfe, per quod praedictus nuper rex Carolus se-
 cundus ad ecclesiam illam sic vacantem per literas suas patentes sub
 magno sigillo suo Angliae sigillatas gerentes datum apud Westmonaste-
 rium vicesimo octavo die Augusti anno regni ejusdem nuper regis
 Caroli secundi duodecimo praesentavit quendam Petrum Samways
 sacrae

Who was ad-
mitted, &c.

James I. died.
Whereby the
advowson de-
scended to
Charles I.

The church
became void
by the death
of Wilson.

K. Charles I.
10 Mar. 10
regni present-
ed Dr. Henry
Wickham.

Who was ad-
mitted.

The church
became void
by the death
of Wickham.

John Piers by
usurpation up-
on the king
presented Wil-
liam Metcalfe.

Who was ad-
mitted, &c.

Charles I.
dies.

Whereby the
advowson de-
scends to
Charles II.

The church
voids by the
death of Met-
calfe.

Charles II. 28
Aug. 12 regni
presents Peter
Samways.

sacrae theologiae professorem clericum suum, prout per recordum in rotulamenti dictarum literarum patentium ultimo mentionatarum in praedicta curia cancellariae dictorum domini regis et dominae reginae nunc apud Westmonasterium praedictum remanens plenius apparet, qui quidem Petrus Samways ad praedictam praesentationem praedicti nuper regis Caroli secundi fuit admissus institutus et inductus in eadem tempore pacis tempore dicti nuper regis Caroli secundi, praedictoque nuper rege Carolo secundo de advocacione ecclesiae praedictae ut praefertur seifito existente, idem nuper rex Carolus secundus postea apud Westmonasterium praedictum de tali statu suo inde seifitus obiit, post cujus mortem advocatio ecclesiae praedictae descendebat Jacobo nuper regi Angliae secundo ut fratri et haeredi praedicti nuper regis Caroli secundi, per quod praedictus nuper rex Jacobus secundus fuit seifitus de advocacione ecclesiae praedictae ut de uno grosso per se ut de feodo et jure in jure coronae suae Angliae, qui quidem nuper rex Jacobus secundus de advocacione praedicta ut praefertur seifitus de regimine hujus regni Angliae se demisit, per quod advocatio praedicta eidem domino regi et dominae reginae tunc devenit, per quod iidem dominus rex et domina regina nunc fuerunt et adhuc existunt seifiti de advocacione ecclesiae praedictae ut de uno grosso per se ut de feodo et jure in jure coronae suae Angliae, et sic inde seifitis existentibus, ecclesia praedicta vacavit per mortem of Samways; whereupon it belongs to the King and Queen to present, and the defendants hindred them, &c.

Who was admitted, &c.

Charles II. dies.

Whereby the advowson descends to James II.

James II. abdicates.

The bishop claims nothing but as ordinary, therefore judgment is given against him with a *cesset executio*, &c.

The defendant Piers confesses by his plea, *quod bene et verum est*, that Charles I. was seised of this advowson in gross, and that he presented Dr. Henry Wickham his chaplain; but he farther says, that King Charles I. being seised as aforesaid, by his letters patent dated the nineteenth of July 14th of his reign (which he pleads with a *profert in curia*) *ex speciali gratia et mero motu* granted the said advowson *Willelmo Theaxton tunc armigero postea militi*, to him and his heirs, by virtue whereof Theaxton was seised in gross, and being so seised the church became void by the death of Wickham; whereupon John Piers father of the defendant, not having any right, but by usurpation upon Theaxton, presented William Metcalfe, who was instituted and inducted, upon which Piers became seised of the advowson in gross by usurpation, and William Theaxton, then being created knight, released to Piers and his heirs all his right, interest, &c. in the said advowson; that Piers being seised in fee died, whereby the advowson descended to the defendant Richard Piers as son and heir, whereby he was seised in gross, and being so seised, the church became void by the death of Metcalfe,

Metcalf, and continuing void for a year and a half, King *Charles II.* presented *Dr. Samways* by lapse, who was instituted and inducted; that *Dr. Samways* is dead, upon which the defendant presented the other defendant *Scroope* [who is also since dead] and then he traverses, *absque hoc* that *Charles I.* died seised.

The defendant *Scroope* pleaded the same plea.

The attorney general craves oyer of the letters patent, which being entred *in haec verba*, recited that Queen *Elizabeth* by her letters patent dated the 20th of *February* the thirteenth of her reign *inter alia* granted to the earl of *Warwick* and his heirs the manor of *Bedall* and other lands late the possessions of *Simon Digby* attainted of high treason, with all mesuages, &c. and among other general words, *omnes advocaciones et jura patronatus ecclesiarum in Bedall, et alia dicto manerio de Bedall spectantia vel quoquomodo pertinentia*; then the letters patent recite, that King *James I.* the eighteenth of *August* in the seventh of his reign granted the rent reserved by the patent of Queen *Elizabeth* to Sir *Christopher Hatton* and *Needham*; and then they recite, that all these premises by good and sufficient assurances were vested in Sir *William Theaxton*; then King *Charles I.* confirms to Sir *William Theaxton* and his heirs the said manor of *Bedall* and the rent, and all advowsons appertaining to the manor; *cumque praedictus Willelmus Theaxton virtute praedictarum literarum patentium eidem comiti Warwick de praemissis ut praefertur factarum advocacionem ecclesiae de Bedall praedictam vel jus praesentandi ad ecclesiam illam secundum tenorem et intentionem earundem literarum patentium habere clamat sibi haeredibus et assignatis suis*; and forasmuch as we before this time presented one *John Wilson* to the said church of *Bedall* by lapse, and afterwards the church being void by the death of *Wilson*, we presented *Dr. Wickham pleno jure*; and then they recite, that *Theaxton* to recover his right and presentation sued a *quare impedit* against the bishop of *Chester* and *Wickham*, in which issue was joined; but that afterwards an agreement was made between *Theaxton* and *Wickham*, that *Theaxton* should desist from his suit, and permit *Dr. Wickham* to enjoy it during his life, and afterwards *Theaxton* and his heirs should present as often as the church should be void; and the King recites that he was informed of this agreement by *Dr. Wickham* his chaplain; *nos igitur volentes*, that the said presentations of *Wilson* and *Wickham*, or of either of them, or their institution and induction, should not prejudice the lawful right of *Theaxton* and his heirs, to present to the said church for the time to come; *intentioque nostra ulterius existit*, that *Theaxton* his heirs and assigns should freely and peaceably enjoy the advowson of the said church *secundum tenorem et veram intentionem praedictarum literarum*

literarum patentium per praedictam nuper reginam Elizabetham praefato comiti Warwick ut praefertur confectarum, aliquo defectu seu aliquibus defectibus in eisdem literis patentibus non obstantibus; sciatis igitur, quod dedimus et concessimus advocationem praedictae ecclesiae de Bedall, necnon medietatem advocationis illius ecclesiae, et totum jus, titulum, et clameum, quaecunque, &c. quae quovismodo habemus, vel habere poterimus, to the said advowson; then follows a general non obstante of the omission of the mention of the true value, or of any former grant, &c.

The attorney general after this *oyer* of the letters patent demurs, and shews for cause, that the defendant *Piers* has not sufficiently induced his traverse. The defendants join in demurrer. And in the Common Pleas judgment was given for the King and Queen by *Treby* chief justice, *Nevill*, and *Powell senior*, justices. Upon which error was brought in *B. R.* and this case was argued by serjeant *Pemberton* and for the plaintiffs in error, and by Mr. *Place* and the attorney general for the King; and afterwards solemnly argued on the Bench in this term by all the judges; and two points were made in this case.

1. If the letters patent of King *Charles I.* passed the advowson to Sir *William Theaxton* and his heirs.

2. If the grant shewn upon the *oyer* can be intended the same grant with that which was pleaded.

And as to the first point *Turton* justice argued, that the letters patent of *Charles I.* could not pass the advowson to Sir *William Theaxton* and his heirs.

And he said, that he would consider the case abstracted from the letters patent.

And secondly as it was upon the record with them.

Profert in curia.

Dying seised traversed in quare impedit.

And 1. he was of opinion, that if the defendant had not pleaded these letters patent with a *profert in curia*, as he had no need to do, 3 *Cro.* 317. that then the plea had sufficiently confessed and avoided the plaintiff's declaration, and the alleging of the grant to *Theaxton* in fee had been a good inducement, to traverse the dying seised of King *Charles I.* *Jones* 11, 12. *Winch* 13, 14.

2. He was of opinion, that this advowson ought to be taken as an advowson in gross. 1. Because the King has declared that Queen *Elizabeth* was seised in gross, which the defendant has not denied,

denied, but has admitted it. 2. Because the defendant has not only admitted it, but he has also confessed it; for he says, *quod bene et verum est, quod Carolus primus devenit seifitus modo et forma*, as is specified in the declaration, and in the declaration it is shewn, that the Queen was seifed in gross; so that it is as full a confession, as if he had confessed it *in terminis*. 3. It must be in gross, because if it had been appendant, it would have passed to the earl of Warwick by the letters patent of the Queen, and then the Queen had not died seifed of it, as is alleged in the declaration.

2. He considered the case as it was upon the record together with the letters patent, and in that consideration two questions arise.

1. If the advowson passed by the letters patent of Queen Elizabeth to the earl of Warwick.

2. If not, yet if it passed by the letters patent of King Charles I. to Sir William Theaxton.

And as to the first he was of opinion, that this advowson did not pass to the earl of Warwick by the letters patent of the Queen; 1. Because the Queen was seifed thereof in gross, and she grants it as appendant, and so she was deceived in her grant. *Moor 45. Hob. 323. 2 Mod. 2.* 2. It does not appear, that the Queen intended, that this advowson should pass; for it is comprised only in the general words *advocationes et jura ecclesiarum, &c.* And probably if the Queen had intended, that this advowson should pass, the church being of great value, she would have granted it by express name.

The King grants an advowson as appendant, if it be in gross, it will not pass.

Objection. It shall be intended to have been appendant.

Answer. That intendment cannot be admitted against the record.

2. Admitting that it did not pass by the letters patent of the Queen to the earl of Warwick, then if it passed by the letters patent of King Charles I. to Sir William Theaxton. And he was of opinion, that it did not. 1. Because upon consideration of the recital of the letters patent it appears, that the King's intent was only to confirm the old title of Sir William Theaxton, and not to give him a new title, but that he should have such estate, as the earl of Warwick had of the grant of the Queen. For the clause in which the grant is contained is not independant of the precedent clause, but is coupled with it and the recitals by the illative conjunction *igitur*. 2 *Brownl. 232, 239.* And in effect the design

Exposition of sentences.

of the King seems to be only to prevent any prejudice, that his presentations might have done to *Theaxton's* title under the earl of *Warwick*. 2. One ought to take care that the King be not deceived, for when he is deceived the grant is void. 5 Co. 93. 1 Co. 43. *Lane* 75. 2 *Roll. Abr.* 188. Now here the King is deceived, for the King imagined, that *Theaxton* had a right to the advowson, when in truth he had none at all; and therefore the grant founded upon such false consideration is void. Besides, that a false recital in letters patent will render the King's grant void. *Hob.* 203, 204. Now it is recited in these letters patent, that *Theaxton* claimed, &c. which according to 2 Co. 90. ought to be intended a lawful claim; whereas it appears before, that he had no title to the advowson; and for this cause the grant is void. 3. No notice is taken in any of the letters patent, that this advowson was in gross; and therefore that vitiates the grant. *Lane* 109. 3 *Leon.* 119, 149. And for these reasons he concluded, that the letters patent of King *Charles I.* did not pass the advowson to Sir *William Theaxton* and his heirs.

The King deceived.

False recital in the King's grant.

But against this it was argued by *Holt* chief justice, and *Rokeby* justice, that this grant of *Charles I.* was good. And *Holt* chief justice said, that the principal ground upon which the judges of the Common Pleas gave their opinion was, that they took it as admitted, that this advowson was in gross in the reign of Queen *Elizabeth* at the time of the grant to the earl of *Warwick*.

And as to that he was of opinion, that it is not admitted upon this record, that Queen *Elizabeth* was seised in gross at the time of the grant to the earl.

2. Admit that it was then in gross in the Queen, yet he was of opinion, that it passed by the letters patent of *Charles I.* to *Theaxton*.

Time of the seisin.

As to the first the case is thus. The attorney general declares, that Queen *Elizabeth* 14th of February 12th of her reign was seised of this advowson in gross, and then presented *Tyms*, prout by the inrolment of the letters patent in Chancery *nunc apud Westmonasterium remanens plenius apparet*. Now though the defendant admits *Charles I.* to have been seised of this advowson in gross by descent, and consequently that Queen *Elizabeth* was seised in gross of it at some time of her reign; yet he does not admit it at the precise time of the 14th of February 12th of her reign; because the alleging of the time and day when Queen *Elizabeth* was seised in gross is surplussage and immaterial; for it is sufficient to allege general seisin

seisin in a *quare impedit* in time of peace in the reign of such a King. Then though the defendant does not deny a thing, yet he admits by it only things materially alleged, but he does not admit things immaterially alleged. Then if he has not admitted the seisin in gross, and presentation of *Tyms* 14th of February 12th of the reign of *Elizabeth*; then the advowson may have been appendant to the manor of *Bedall* at the time of the grant to the earl of *Warwick*, and so might well pass by the letters patent. The time of the seisin and presentation is not traversable, and all the precedents never allege the day of the seisin or of the presentation. Then if it is so immaterial, that one cannot deny it, the not denying it will not amount to an admittance. Besides, that nothing that is immaterial, though it be admitted, will amount to an estoppel. *Co. Lit.* 303, 352. *b.* If the defendant had shewn another title in his plea, and had traversed the presentation of *Tyms*, *modo et forma*, and it had appeared upon the evidence at the trial, that the queen had presented in the 43 year of her reign; that would have maintained the issue, and the verdict must have been against the defendant. In actions of trespass and battery, where it is necessary to shew a time in the declaration, evidence of a trespass at any other time before the action brought will maintain the issue. *A fortiori* in this case, where there is no need to allege a time; so that it would be very unjust, to conclude a man by his admittance of a thing which he could not traverse, or if he could, is not material to be proved. And though it is an admittance of a seisin in gross in *Queen Elizabeth* in some time of her reign, yet there was time enough in her long reign for usurpations after the letters patent, by virtue of which she might have presented *Tyms*. 2. There is art here in the pleading of the inrolment of the letters patent of presentation in Chancery, for they thought that they could not be denied; but that is of no signification, for if the letters patent are inrolled in the same court where the plea is, one may plead them without shewing them, but if they are inrolled in another court one cannot plead the inrolment, without making a *profert* of an exemplification of them under the great seal. 5 *Co.* 74. *Wymark's* case. Now if the declaration had been without artifice in the usual manner, *viz.* in the time of peace, &c. and the defendant had pleaded as he has done here upon *oyer* of the letters patent, it had been a good title for the defendant, because the defendant would not be obliged to aver that this advowson was appendant, for the contrary, *viz.* that it was in gross in the queen at the time of the grant to the earl of *Warwick*, would not appear; and all things upon *oyer* shall be intended to make the grant good, if nothing to the contrary appears. 2 *Cro.* 679.

Admission.

Traversable.

Estoppel.

T. Jones 170.

Raym. 456.

Fitzh. estop.

69, 247.

Issue maintained.

Hob. 71.

2 Leon. 99.

Profert in curia.

Averment.

Bro. Plea 143.

7 Hen. 7. 7.

1 Roll. R.

415.

Keilw. 49.

Dier 215.

Intendment.

2. Admit

2. Admit that it was not appendant at the time of the grant to the earl of *Warwick*; yet he was of opinion, that this advowson passed by the letters patent of King *Charles I.*

1. By him, the grant is full and express.

2. No suggestion in the patent is false, unless that which says, that *Wilson* was presented by King *Charles* by lapse; nor is it said, that the advowson passed by the letters patent of the Queen.

Claim.

Consideration
of the King's
grant.

3. Where it is said, that *Theaxton* claimed it by virtue of the patent of the Queen, that must not be intended lawful claim; for if a man claims an advowson by colour of a void patent, and the King presents, and afterwards in consideration that the other will permit his clerk to enjoy during his life, the King grants the advowson to the other and his heirs, and the other permits the King's clerk to enjoy it during his life; it is a good consideration, and the patent is good.

Objection. It is said in the recital of the patent of *Charles I.* that *Theaxton* sued a *quare impedit*, to recover *suam praesentationem*.

Answer. That is only the suggestion of the writ.

Grant of the
King.

Atkyns v.
Holford.

4. It is supposed and admitted by the letters patent of *Charles I.* that the patent of *Elizabeth* might be void, yet the King declares, that it was his true intent, that *Theaxton* and his heirs should enjoy it, notwithstanding any defects in the letters patent, and then proceeds to the absolute grant of the advowson to *Theaxton* and his heirs. There are stronger cases, where the intent of the King has been to confirm letters patent that were void, yet if his intent has also appeared, to grant the thing *de novo*, the letters patent have been adjudged good and the grant also. 8 Co. 166. Hil. 22 & 23 Car. 2. in *scaccario* in the time of chief baron *Hale*, the case between *Atkyns* and *Holford* was thus; King *Edward 3.* by his letters patent, reciting that King *John* had by his charter granted to the abbot and convent of *Thistleworth* *returna brevium*, and reciting that it had been found by inquisition, that the abbot and convent usurped the franchise of the crown, so that the franchise was re-vested in the crown; first *Edward III.* confirms the charter of King *John*, and then goes on and grants to the abbot and convent *returna brevium*; it was agreed in that case, that the charter of King *John* was void; and it might have been objected, that King *Edward III.* esteemed the charter of King *John* good, and that the inquisition was false, and therefore he intended only to make restitu-

tution of the franchise that was revested in the crown; but it was adjudged, that though the grant of King *John* was void, yet the grant of *Edward III.* was good, because the intention of the King appeared to pass to the abbot and convent the *returna brevium*. And this case he cited as a case in point.

Objection. This clause is qualified by the *secundem tenorem et veram intentionem literarum patentium* of the Queen, &c.

Answer. That intent is not to be understood of that which actually passed, but of that which was designed to pass; for the patents of *Charles I.* suppose a defect in those of the Queen; so that it is not to be construed a legal intent, but a moral intent. If this advowson at the time of the Queen's grant had the reputation Reputation. to be appendant, the Queen might well have intended to pass it, though in strictness of law if it was in gross it could not pass. A manor in reputation may pass by the name of a manor in grants between common persons, 6 Co. 63. though perhaps the law may be otherwise in the case of advowsons. If a man seised of a manor to which an advowson is appendant, mortgages the manor in fee, Appendant. excepting the advowson; if the money is paid at the day the advowson is become again appendant; but if the money is paid after the day, it will have the reputation of appendancy, but in truth it is not appendant. It might be that this advowson was appendant before the Queen presented *Tyms*, and was then severed, but retained afterwards the reputation of appendancy; and if in this case the grant was of the manor with the advowson appendant, this reputation might be sufficient to justify the intent of the letters patent, that it was intended to be passed. Besides, that in this case it does not appear, that there was any other advowson but *Bedall* appendant to this manor, which is a foundation of a very strong presumption of the Queen's intent to pass it. He said farther, that he had searched in the history of this church, and it seemed to him, that it was appendant to the manor at the time of queen *Elizabeth's* grant. See *Co. Entr. tit. quare imp. pl. 2.* It appears, that this advowson was appendant to this manor in the time of *Edward III.* afterwards a man was seised in fee of the manor of *Bedall*, to which this advowson was appendant, and it descended to two coparceners, so that then it was appendant by turns, one time to the one moiety, and the other time to the other moiety; one moiety of it came to the lord *Lovel* in fee, who was attainted of treason in the time of *Henry VII.* by which *Henry VII.* was seised of it in fee; afterwards *Henry VII.* gave this moiety to the ancestor of *Digby* in tail, from whom it came to *Simon Digby*, who in the time of Queen *Elizabeth* committed treason, and then the church became void, and the Queen presented, and then *Digby* was attainted; so that the case is thus; tenant in tail

Appendant. tail of a manor, to which an advowson is appendant, reversion to the Queen in fee, tenant in tail commits treason, then the Queen in reversion usurps, by this the advowson is in the Queen in gross, afterwards tenant in tail is attainted, the advowson is become appendant again; for the appendancy was not destroyed by the usurpation, for though it was severed from the estate tail, yet it was not severed from the fee; then by the attainder the estate tail is wholly extinct, and the Queen is seised in her *reverter*. As if there is tenant for life of a manor to which an advowson is appendant, the reversion in fee to *A.* *A.* usurps upon the tenant for life, the advowson is become in gross, but if the tenant for life dies, it is become appendant again. *Hob. 323.* Sir *William Elvis's* case. So that though the Queen might have been seised in gross, when she presented *Tyms*, yet the advowson might have been appendant at the time of the grant to the earl of *Warwick*. And the surer way here to have come to the right, had been to have taken issue upon the traverses, and not to have laid snares to trap mens rights, which judges ought to discourage.

Extinguishment. tail of a manor, to which an advowson is appendant, reversion to the Queen in fee, tenant in tail commits treason, then the Queen in reversion usurps, by this the advowson is in the Queen in gross, afterwards tenant in tail is attainted, the advowson is become appendant again; for the appendancy was not destroyed by the usurpation, for though it was severed from the estate tail, yet it was not severed from the fee; then by the attainder the estate tail is wholly extinct, and the Queen is seised in her *reverter*. As if there is tenant for life of a manor to which an advowson is appendant, the reversion in fee to *A.* *A.* usurps upon the tenant for life, the advowson is become in gross, but if the tenant for life dies, it is become appendant again. *Hob. 323.* Sir *William Elvis's* case. So that though the Queen might have been seised in gross, when she presented *Tyms*, yet the advowson might have been appendant at the time of the grant to the earl of *Warwick*. And the surer way here to have come to the right, had been to have taken issue upon the traverses, and not to have laid snares to trap mens rights, which judges ought to discourage.

Objection. There is a false suggestion, that King *Charles I.* presented *Wilson* by lapse, where in truth king *James I.* presented him *pleno jure*.

False recital in the King's grant.

Answer. Every false recital in a thing not material will not vitiate the King's grant, if it appears that it was his intent to grant the thing; now here the King would not hazard the title of *Wickham*, and therefore took this means to determine the controversy, by the confirmation of *Theaxton's* right if there was any in him, or if he had no right, to give him a right. And the consideration is sufficient if *Theaxton* had no right, *viz.* the desisting from the suit, whether he had right of suit or not. And he compared it to 1 Co. 43. 6 Co. 55. surrender of letters patent, &c. It is not material to *Theaxton* whether King *James I.* presented by lapse, or *pleno jure*; and every little mistake in an immaterial point will not avoid the King's grant, if the intent appears, and the substance is performed. 1 Roll. Rep. 23. *Godfrey v. Sparrow.* 2 Roll. Rep. 118. *Dixon's* case. *Hob. 223.*

Besides, if the judges adjudge these letters patent of *Charles I.* void, it will avoid the letters patent of Queen *Elizabeth*, which are not before the court; and one cannot adjudge letters patent void, which appear only by recital. And farther the letters patent of the Queen might have words general enough to convey the advowson in gross, for the recital says, that the Queen *inter alia* granted; now it may be, that the letters patent of the Queen contain these words, *viz. aut existentes in Bedall*; and those words would pass the advowson in gross; and if that had appeared in evidence upon issue joined, the verdict would have been for the defendant. 1 Mod. 195.

Objection. The granting part of the letters patent must relate to the recitals.

Answer. If it appears by the recitals, that the King has intent to pass nothing in which he had profit, but only what was detained by concealment from him, the recital will qualify the general words of the grant, because it appears that his intent was not to diminish the revenues of the crown. *Legat's case*, 10 Co. 109. But if there are words in the grant which shew that the King intended to pass the land although it was not concealed, the grant will be good to pass the land which was not concealed. *Hardr.* 231. pl. 7. And for these reasons he was of opinion, that this advowson passed by the letters patent of *Charles I.* *Eyre* justice declared that he was of the same opinion. But he did not argue this point, because the other point which follows was, as he said, an unsurmountable obstacle.

As to the second point, whether the grant shews upon the *oyer* 2 Point. can be the same grant with that which was pleaded, by reason of Variance. a variance. For the defendant pleaded a grant *Willelmo Theaxton tunc armigero postea militi*, and upon the *oyer* the grant appears to be *Willelmo Theaxton militi*. *Rokeby* justice was of opinion, that there was a sufficient demonstration of the person, and that nothing appeared in the record to induce the court to intend that *William Theaxton* esquire and *William Theaxton* knight were two distinct persons, but that they were the same person; for (by him) the dignity does not change the man; and it is only in this case a mistake in an adverb of time. And as to the objection, that if one makes a grant to a man by the stile of knight, who is but an esquire, the grant is void. He answered, that it is a maxim, that *veritas demonstrationis tollit errorem nominis*. *See 11 Co. 21.*

2. (By him) if a grant be made to a man by the name of knight, if he is not a knight, yet the grant is good, if it may *constare de persona*. 2 Cro. 240. And in *Littleton's reports* 181, 197, 223. it is the opinion of all, that the mistake of an addition will not avoid a grant, if it may *constare de persona*. 1 Cro. 173. *Jones* 215. 1 *Bulstr.* 21. And therefore he was of opinion, that the judgment given in the common pleas ought to be reversed.

But *Holt* chief justice, *Turton* and *Eyre* justices, argued against *Rokeby* justice in this point. For by *Holt* chief justice, a grant to *William Theaxton* Esq; by the name of *William Theaxton* knight, is void. 1. Because knight is part of the name of a man. 2. It is a name of dignity, which is part of the name of a man as much as

Bro. name 33.
grants 50.
4 Hen. 6. 1.
per Rolfe.
Addition.

4 H. 7. 7.
Hutt. 41.

9 Rep. 49.

5 H. 6. 25.

7 Hen. 4. 7.

per Shrens.

14 H. 6. 25.

per Newton.

32 Hen. 6. 29.

Darby and

Priscott.

3 Ed. 4. 23. a.

a *Christian* name. So that if a man be stiled of another dignity than that of which he is, it is ill. And as to the *demonstratio personae* objected by *Rokeby*, *Holt* answered, that it ought to appear upon the face of the grant; for otherwise the allegation of the party, that he is the same person, signifies nothing. The name of esquire is merged by the accession of the name of knight, so that he who is a knight, can never be called esquire afterwards, which is but a name of worship. 6 Hen. 4. 8. *Seld. tit. hon.* 683, 9. 2 *Inst.* 594. *Hutt.* 41.

8 Ed. 4. 23. a. L. 5. Ed. 4. 106. 21 Ed. 4. 72. Br. addit. 58. 1 Cro. 371. Hob. 129. Name merged.

Objection. Sir *William Theaxton* might be a reputed knight, and not a real knight; and a name by reputation is sufficient for purchases.

Answer. A knight reputed, and who is not a real knight, is no knight at all, and cannot take by that name. 2. If there was such a reputation, the defendant should have shewn it.

Reputation.

Bastard purchaser.

6 Co. 64. 5.

Knights created.

Credit of knights.

In all cases of reputation there ought to be some foundation for such reputation, which could not be in this case. It is agreed, that a bastard in legal understanding has no father nor mother; nevertheless, some of them must know their mother well enough; yet a grant to a bastard by the name of son of such a woman is ill, unless he be reputed the son of that woman by all the neighbourhood, not by one or two; and notwithstanding that there is a ground in nature to raise a reputation, for he must be the son of some woman. But if a man be bastard *eigne*, because by the civil law he is *mulier*, there is a greater foundation for reputation, and he shall take by the name of son of such a woman without a general reputation. Then in the case of knights, heretofore knights were created by great lords as well as by the King, but that was supposed to have been by virtue of a charter; but since honour is conferred by none but the King, there cannot be any foundation for a reputation to be a knight. The dignity of knights was in great esteem in the law, and great credit was given to them. In the trial in a writ of right the law will not intrust the sheriff to return the jury, but the panel of the great assise must be made by four knights, &c.

Objection. A name of dignity may be supported by reputation. For suppose a grant be made to the eldest son of an earl by the name of viscount of such a place, it would be a good grant.

Precedence of the sons of dukes.

Answer. There is a foundation for such a reputation, for by the law of heraldry the eldest son of a duke preceeds all earls; and convey-

conveyancers call them esquires, commonly known by the name of earls. The eldest son of an earl preceeds barons, &c.

Objection. 2 Cro. 240. Lord *Ewre v. Strickland*.

Intr. Pasch.
7 Jac. 1.
rot. 405.

Answer. The addition in that case being of such a dignity, as that one person only is capable of it, carried sufficient certainty in itself, and therefore was good according to *Co. Li. 3. a.* which was the reason of that case, as appears, 1 *Bulstr.* 21. where the same case is better reported than in 2 Cro. which is extraordinary, that any thing shall be better reported in *Bulstrode* than in *Croke*.

As to the case of the earl of *Pembroke* against *Green and Bostock*, reported in *Littleton's Rep.* 181, &c. 1 Cro. 172. and 1 *Jones* 215. the case is mistaken in 1 Cro. for the issue there was not upon the grant to *W. S.* but upon the grant of the next avoidance. But it is the express opinion of three great judges, *Dier* 299. b. pl. 35. that if issue had been taken upon the grant to *W. S.* the issue had been for the defendant. Though that seemed to *Holt* chief justice difficult to maintain, when the verdict had found him to be the same person. But there is no reason for the opinion of *Hutton* and *Richardson* chief justice in *Littleton's Reports*. For if the law were so, names would be useless, for *John S.* is as much *Thomas S.* as *Sir William Theaxton* knight is *William Theaxton Esq.* It is true, that there are several persons who purchase by the name of *Thomas, John, &c.* who was never christened; but in such cases those are surnames only. 2. If reputation might have been sufficient, the defendant nevertheless ought to have averred it, viz. that *William Theaxton* was *revera* esquire, *sed tamen cognitus et reputatus* a knight. And such an averment ought to be made in all cases where a man has acquired a reputation contrary to the truth of the fact. And for these reasons the three judges were of opinion, that this variance was so great an obstacle, that they could not come at the merits of the cause, but for this defect the plea was ill; and therefore (by them) the judgment in the Common Pleas ought to be affirmed, which was done accordingly. Afterwards upon error brought in parliament this judgment was reversed, without any consideration had of the opinion of the judges.

Britton vers. Cole.

TRESPASS. The plaintiff declares, that the defendant the twentieth of May 7 Will. 3. at *Hanap* in *Gloucestershire* took and chased forty-three sheep and two lambs of the plaintiff, &c. The defendant pleads, that 12 Febr. 6 Will. 3. a *levari facias* issued out

S. C. 1 Salk.
395, 408.
5 Mod. 109.
Carth. 441.
Skin. 617.
Of 3 Danv. Ab.
305. p. 1.
Post. 1531.

4 I

S. C. Comyns 51. Comb. 470, 107. 12 Mod. 178. Cro. E. 431. 2 Ro. Ab. 457. Post. 1531.

6 Mod. 37.
3 Lev. 399.

of the Exchequer, directed to the sheriff of Gloucestershire, reciting, that forasmuch as the late sheriff of Gloucestershire, by virtue of a writ of *capias utlagatum* issued out of the Common Pleas against Francis Cressett being outlawed at the suit of the defendant in debt in Somersetshire 12 June 5 Will. & Mar. in the same year 28th December took an inquisition, which found, that the said Cressett was seised in fee of lands to the value of 55 l. per annum, and seised them into the King's hands, prout per the transcript of the writ and inquisition returned into the office of the remembrancer in the Exchequer appears; and commanding the sheriff, that all rents, issues, &c. of the premisses, from the time of the seizure into the King's hands until the 25th of March following, should be by him levied, according to the value returned by the inquisition, &c. so that he should have the money before the barons of the Exchequer, to be paid to the defendant, &c. by virtue of which writ the sheriff made a precept to Antony Powell, John Okes, and Joseph Powell, commanding them to levy, &c. and because the forty-two sheep and two lambs were *levant* and *couchant* upon the premisses, &c. the defendant requested Antony Powell and Joseph Powell to take and chase them, &c. upon which John Powell and Joseph Powell took and chased them; which is the same trespass, &c. The plaintiff demurs. And this case was several times argued at bar by Mr. Northey and Sir Bartholomew Shower for the plaintiff, and Mr. serjeant Wright and Mr. Keen for the defendant. And now Holt chief

Upon a *levari facias de exitibus terrae* the cattle of a stranger *levant* and *couchant* upon the land may be taken and sold.

Issues of land, what?

justice pronounced the opinion of the court. And the question upon the plea in point of law was, if a man be outlawed, and upon a special *capias utlagatum* an inquisition is taken, and the man's lands seised into the King's hands, and the yearly value returned into the Exchequer; and then a writ of *levari facias* issues, commanding the sheriff to levy the yearly value out of the issues and profits of the land, and by virtue of that writ the sheriff seises the cattle of a stranger, being *levant* and *couchant* upon the premisses; whether the taking of this cattle of a stranger be in such case justifiable? And the whole court was of opinion, that it was. 1. Because it is within the direct command of the writ, to levy that which is due, according to the yearly value, out of the issues and profits of the land; for cattle *levant* and *couchant* are part of the issues of the land. *Westm. 2. cap. 39.* is an explanatory act, and says that *omnia mobilia* shall be issues. 2 *Inst. 453.* and *Flet. lib. 2. cap. 68.* holds cattle to be comprised under the word *mobilia*. And that is not restrained to the cattle of the owner of the land, but is extensive to the cattle of all men. 2. Because the land is debtor to the King, and that makes the cattle upon it liable to this execution. For if the King should not have this remedy, the pernancy of the profits of the land upon outlawry would be very small, and it may be would be worth nothing; for then it would be in the power of the

the man outlawed to defraud the King of the whole, by letting of the land to pasturage; in which case if he could not seise the cattle *levant* and *couchant* upon the land, he could not have any remedy against him who should hire the land for agistment; nor could he have the money payable by such contract, because it would be an agreement in gross. If *A.* being outlawed makes a feoffment during the outlawry, the feoffee puts in his cattle, doubtless these are issues, because the feoffee takes the land in the same plight as the feoffor had it, but the feoffment notwithstanding is good. 21 Hen. 7. 7. But the interest of the King to take the profits continues notwithstanding the feoffment, though the opinion in 21 Hen. 7. 7. is contrary. If issues be returned upon a juror, they shall be levied upon the feoffee. 19 Hen. 7. 30. If *A.* be outlawed, and aliens his land before inquisition taken, the alienation prevents the King from taking the profits, otherwise if the alienation were after the inquisition found; and this is the constant course of the Exchequer. *Hard.* 101. *Raym.* 17. *Windser v. Seywell.* For the King has nothing before inquisition found upon outlawry as to the real chattels; but as to the personal chattels, they are in the King without inquisition found. If then the cattle of a feoffee, &c. may be taken for issues, why not the cattle of the plaintiff, who perhaps is the feoffee of *Cresset*, nothing to the contrary thereof appearing here? And this plea being in bar shall be good to a common intent; and if the plaintiff has any special title, he ought to shew it. Besides, suppose that the plaintiff has a lease from *Cresset* preceedent to the outlawry, if it is not found in the inquisition, the plaintiff cannot reply it in trespass, but must have recourse to the Exchequer, and plead it by way of *monstrans de droit*. But if the plaintiff has no right, it would be unreasonable that he should escape, when he who had right could not.

Objection. 3 Cro. 431. Answer. The case there is of a *feri facias de bonis et cattallis*, and not of a *levari facias de exitibus terrae*. And therefore he could not in such case take the cattle of a stranger; though the book says, that one may upon such a writ seise the cattle of a stranger, but not sell them; which seems very strange doctrine, the writ being *feri facias*.

There are several sorts of executions for the King. 1. *Capias ad satisfaciendum*, which takes the body of the debtor. 2. *Fieri facias* to take his goods. 3. A writ which they call long one, comprising a *capias ad satisfaciendum*, *feri facias*, and *extendi facias*. But by virtue of that one cannot seise the cattle of a stranger, because that writ does not give any authority to the sheriff to seise them. 4. A *levari facias*, where the land is the debtor, in case of

of forfeiture of issues, or profits to be taken upon outlawry, and there the cattle of a stranger may be taken. The forfeiture of issues charges the whole inheritance; therefore if tenant for life forfeits issues and dies, they shall be levied upon the reversioner. *Doct. & Stud. lib. 1. cap. 22.* Because serving on juries being a charge upon landed men for the service of the publick, the whole fee is charged with it. So if an officer for life neglects his office, by which he forfeits issues, &c. that charges the reversioner in fee. If *A.* tenant for life be outlawed, and inquisition found, and the lands seised into the King's hands, and *A.* dies; it is a doubt, whether the arrears of issues shall be levied upon the reversioner; because the charge arises upon the particular default of the tenant for life, and not from any charge upon the inheritance, as in the case of issues. But if that was the present case, the plaintiff ought to shew it; for tenant for life shall not be intended dead, unless it be averred. Issues lost by the lord of the manor, levied upon the copyholders, &c. *2 Roll. Abr. 157. F. 3.* As to the case in *Lane 96. 2 Rol. Abr. 159. pl. 4.* which is obscurely reported, viz. that the cattle of one tenant in common shall not be taken upon a *levari facias* upon the outlawry of the other, if the estate of the other tenant in common be particularly found; it is good law. For if a *levari facias* be to levy the profits of a moiety, the cattle of the other tenant in common there *levant* and *couchant* cannot be taken. For the tenant in common which was outlawed can only forfeit the perannuity of the profits of his moiety. But that matter of the tenancy in common must be intended to be found upon the inquisition, otherwise it is not law. For if *A.* hath land, in which *B.* hath common of pasture for sheep; *A.* is outlawed, and the title of *B.* is not found upon the inquisition; his cattle may be taken upon a *levari facias*, until he hath pleaded his title in the Exchequer, and hath it allowed; *contra* if his title had been found upon the inquisition. In *2 Roll. Abr. 159.* there are some cases which seem to the contrary, but they are not intelligible. As *2 Roll. Abr. 159. pl. 2, 3. Stafford v. Bateman.* The same case *3 Cro. 431.* which says, that upon a *levari facias*, the sheriff may seise, but not sell, which is a contradiction, for every *levari facias* requires a sale as well as a seizure; therefore the book is false printed, and it ought to be a *fieri facias*, as *3 Cro.* is. Now no *levari* issues for a debt against the person, but where the land is debtor. In all cases where the land is the debtor, the cattle of a stranger are as well liable, as those of the owner of the land; as cattle of a stranger *levant* and *couchant* are distrainable for arrears of a rent service. So if a neighbour's cattle escape into land, out of which a rent-charge issues, and are *levant* and *couchant* (there are good authorities though they are not *levant* and *couchant*) they are distrainable for the rent-charge, and the owner

Issues levied.

Bro. Ret. p.

23.

Dalt. Sher.

330.

1 inch. 59.

Right found.

Levari facias.

Distress.

owner shall not have them again, unless he pay the arrears; which is as hard a case as the present case, for the rent-charge is against common right, and commences by the grant of the party. Then it is very reasonable, that the King should have as good remedy as a private man. And for an authority in point *Holt* chief justice cited a case in the Exchequer, *Pasch. 18 Car. 2.* between *Hodson* ^{Hodson v. Trodgin.} and *Trodgin* or *Doobey*, where *Hale* chief baron took the same difference that is taken here, viz. that the cattle of a stranger might be taken upon a *levari facias*, contra upon a *fieri facias*; and *Hale* then said, that the constant practice of the Exchequer was so; and the plaintiff there, seeing the opinion of the court to be against him (for the case there was the same with the principal case here) desisted from his suit, and so no judgment was given. And in the case in 2 *Roll. Abr. 159. pl. 3.* it is said, that it was adjudged contrary at *Reading*, because the cattle were not averred to be *levant* and *couchant*. And *Rokeby* justice cited a case in corroboration of the said opinion between *Wrightson* and *Reyner*, ^{Wrightson v. Reyner.} *Mich. 22 Car. 2. Exchequer Rot. 14.* which was in point, and the court there of the same opinion as in this case, but no judgment was entred upon the roll. And for these reasons the whole court held the plea good in substance. But then for other exceptions they held the plea ill. And the first exception was, that the defendant, not being an officer, should have pleaded the record of the outlawry, especially it being at his suit. And *Holt* chief justice ^{Justification.} pronounced the opinion of the court, that this was a good exception. For if a writ of *capias ad satisfaciendum*, &c. issue to the sheriff against *J. S.* and there is no judgment to warrant it; the sheriff, and the officers who act under his authority, are excusable if they execute it; but if a stranger encourage the sheriff, &c. to execute it, he cannot justify it. So if the plaintiff in the action perswades and encourages the sheriff, &c. to execute a judicial writ; if trespass be brought against him, if he does not plead the judgment, he shall be a trespasser. *Turner v. Felgate, Raym. 73.* Trespass lies against the party, after judgment is set aside. Now in this case the defendant was either a party concerned, or not. If he was concerned as acting under the authority of the sheriff, he shall be in the same plight, but then he ought to shew it. If he was concerned as plaintiff in the former action, he ought to shew the record of the outlawry, to warrant this execution; for if the outlawry is reversed, and afterwards a *levari facias* is sued, he who sues it shall be a trespasser. But here the defendant does not appear to be a party to the former action, except by the recital of the *levari facias*, which is not sufficient, but it ought to have been averred. Then if he is a mere stranger, he ought not to have requested the bailiff to have taken the cattle, though he was in the execution of the King's writ; but he is a trespasser. As if tres-

Command or
not, traversi-
able.

2 Leon. 196.
Godb. 109.

A man justifies in execution of a warrant of the sheriff made in pursuance of a writ, and does not say that they were delivered, good.

Trespas confessed.

Authority.

8 Co. 161.
Yelv. 38.

Amendment.

pass be brought for cattle taken, &c. and the defendant justifies as bailiff to J. S. and by his command, that he distrained them damage feasant; if the owner did not command him, he shall be a trespasser. The same law for a distress for rent arrear, for the command is traversable. 1 Leon. 150. 2 Leon. 215. 1 Roll. Rep. 46. In consueance for rent in replevin by bailiff the command is not traversable, because that goes to the right; but in consueance for damage feasant the command is traversable in replevin. The second exception was, that it is not said, that the writ was delivered to the sheriff, or the warrant to the bailiff. *Sed non allocatur.* For *per curiam*, though it is the practice to say so, yet it being a plea in bar, it shall be good to a common intent; and if the cattle were taken before the delivery of the writ, the plaintiff should have shewn it in his replication; for no special matter shall be supposed to intervene, to make a man a trespasser, unless it be shewn. 1 Saund. 298. A third exception was, that the warrant and request were made to *Antony Powell* and *Joseph Powell*, upon which *John Powell* and *Joseph Powell* took them. And *per curiam* it is ill for that reason, because the trespass is not confessed and yet justified, for it is no taking pursuant to the command and request. For though according to *Lashbrook's* case in *Hutt.* 127. if a warrant be made to three, without joint and several authority, one of them may execute it, yet a stranger, who is not named in it, cannot execute it. Fourthly the trespass is for taking of forty-three sheep, and the justification is but for the taking of forty-two, and nothing said as to the forty-third. (But some of the council said, that the record as to that was forty-three.) But for these reasons and defects in the pleading, judgment was entred for the plaintiff. Note, Mr. *Keen* moved, to have liberty to amend *John*, and make it *Antony*. But because it was upon demurrer, and part of the fact, viz. who took the cattle; the court held, that it was matter of substance, and therefore not amendable.

The earl of Suffex *vers.* Temple, &c.

11. December. 467.

IN evidence upon a trial at bar in ejectment the case was thus. Sir *Arthur Throckmorton* seised in fee of the lands in question levied a fine, to the use of himself for life, remainder to his wife for life, remainder to Sir *Peter Temple* and *Anne* second daughter of Sir *Arthur Throckmorton* and wife to Sir *Peter Temple* for their lives and the life of the survivor of them, remainder to the first, second, third, &c. sons in tail, remainder to the issues females of their bodies and the heirs of their bodies begotten, remainder to *Elizabeth Throckmorton* third daughter to Sir *Arthur Throckmorton* in

in tail, &c. Sir Peter Temple had issue by Anne two daughters, Anne the eldest and Martha. Martha died without issue. Afterwards Anne died, and the earl of Sussex as grandson and heir of the body of Elizabeth by Thomas lord Dacres claimed the moiety of Martha by virtue of the remainder limited to Elizabeth in tail, and the defendant Temple claimed as heir at law to Anne, who in her life-time suppressed the deed. 1. To prove the deed the plain-Evidence. tiff gave in evidence an answer in Chancery, in which Anne acknowledged the deed, and referred to a special verdict for greater certainty, in which the deed was found *in haec verba*. And this 2 Vern. 194, 288. 5 Mod. 10. 1 Sid. 418. Salk. 286. was admitted as sufficient evidence without scruple, to read the deed against Temple. But the other defendants, who were purchasers under Anne, objected, that they had been in possession twenty years, and therefore the credit of that possession was sufficient evidence for them *prima facie*, so as they shall not be compelled to shew their title; and therefore the answer of Anne in Chancery shall not be read against them, until the plaintiff prove, that they derive their title under Anne. But the plaintiff proving constant Reputation. reputation in the country, that these lands belonged to Anne; the court permitted the answer of Anne to be read against them also, unless they shewed another title from a stranger. 2. As to the merits of the case it was urged,

1. That in this case the remainder to the issues females being in contingency, the first daughter that was born, the remainder attached in her, and could not be divested by the birth of a second daughter; and then Anne having suffered a recovery of the whole, her heir at law had a good title. 7

2. It was urged, that the two sisters were tenants in common, and so the plaintiff was barred of this action by the statute of limitations, Martha having been dead fifty years; for which *Co. Lit.* 188. a. was cited, where tenant for life, remainder to the right heirs of J. S. and J. N. J. S. died first, and afterwards J. N. died, their heirs are tenants in common. But *per Holt* chief justice the estate is limited by way of use to the issues females, and issues females comprehend all issues females. Then the case is, tenant for life remainder to all his issues females, &c. if the tenant for life has but one daughter, she shall have the whole estate tail; if he has more daughters, they shall be joint-tenants for life, with several inheritances. If the contingent remainder vests during the particular estate, or *eo instante* that it determines, it is enough. The case in *Coke* upon *Littleton* of a feoffment to the use of himself for life, and of such wife as he should afterwards marry, and then he marries, he and his wife are joint-tenants, which case will rule this case in question. For it is a joint claim by the same conveyance, Contingent remainders. Joint-tenants.

Statute of li-
mitations.
Ousting of a
tenant in
common.

ance, which makes joint-tenants, and not the time of the vesting. And he seemed to deny the case cited out of *Co. Li.* 188. But as to the possession of one tenant in common being the possession of the other, he said that does not hold place against the statute of limitations. And besides that, if one of them only takes the profits, it is an ousting of the other. *Mr. Jacob.*

Taylor vers. Jones.

Consideration
of *assumpsit*,
that the cap-
tain of a com-
pany of soldi-
ers would per-
mit a soldier
to be absent
ten days,
good.

Replication
too narrow.

Condition pre-
cedent.

Replication
pursuing the
plea is well
enough.

Assumpsit. The plaintiff declares, that he was, and yet is, captain of a foot company of soldiers, and that one *Thomas Jones* was a soldier in his company under him; that the defendant *Francis Jones*, in consideration that the plaintiff would permit *Thomas Jones* to be absent from the company ten days, assumed to the plaintiff, to bring back *Thomas Jones*, or to pay to the plaintiff 20*l.* and avers that he permitted *Thomas Jones* to be absent, &c. The defendant pleads, that *Thomas Jones* died within the ten days, viz. six days, &c. The plaintiff replies, that he did not die within six days, and tenders an issue. The defendant demurs. And *Carter* for the defendant argued, that there is not here any consideration to maintain this action; for the captain of a company has not any property in a soldier, to give him liberty to absent himself from the King's service. *Sed non allocatur.* For *per curiam*, when the captain sees that he has not occasion to use a soldier in the King's service, he may give him leave to be absent for some reasonable time; and it is lawful enough, and is a benefit to the soldier, for without the captain's leave he cannot absent himself from the company. Then *Showers* for the defendant took exception to the replication, that it was too strait and narrow; for the plaintiff tenders issue, that *Thomas Jones* did not die within six days. Now it may be, that he did not die within six days, and yet die within the ten days, which would excuse the defendant. Therefore the plaintiff should have said, that *Thomas Jones* did not die within ten days. *Sed non allocatur.* For *per curiam* the defendant has tied it to six days in his plea, and therefore the replication pursuing the plea is well enough. And judgment was given for the plaintiff, *nisi*, &c.

Thompson

Thompson *vers.* Leach.

Intr. Hil. 7 Will. 3. Rot. 733.

Ejectment. Upon trial at bar the jury find a special verdict, S. C. Cases in Parl. 150. that *Nicolas Leach* was seised in fee of the lands in question, 3 Mod. 301. and 9 November 14 Car. 2. made his will in writing, by which he Carth. 211, devised these lands to *Simon Leach* for life, remainder to his first, 435. second, third, &c. sons in tail, remainder to Sir *Simon Leach* 3 Lev. 284. (who is the now defendant) in tail, remainder to the right heirs of &c. 2 Salk. 427, *Simon Leach*; afterwards *Nicolas Leach* died, and *Simon Leach* 2 Vent. 198. entred, and was seised for life; and being so seised by deed bearing Abr. of Cases in Eq. 278. date the 20th of August 25 Car. 2. purporting a surrender, surren- 3 Danv. Abr. 164, p. 13. dered that estate to Sir *Simon Leach*; afterwards *Simon Leach* had 1 Show. 296. issue *C. Leach* the lessor of the plaintiff, and died; the jury find S. C. Comyns 45. farther, that *Simon Leach* at the time of the deed of surrender made 12 Mod. 174. to Sir *Simon Leach* was *non compos*, &c. *et fi.* &c. In *Michaelmas* Comb. 469. term last past serjeant *Wright* argued for the plaintiff, that the deed 3 Salk. 301. of *Simon Leach* was absolutely void, and so *nihil operatur*. Ideots Salk. 576, and *non compos* are disabled to alien their lands, or bind themselves. 618. *Bras.* 100, 120. *Briton* 88. *Fleta cap.* 11. N^o 10. And if 2 Salk. 576. they endeavnur to alien, the heir shall have *dum non fuit compos*, 1 Rep. 66, &c. *Reg.* 228. *b.* *Fitzh. Nat. Br.* 202. *a.* From whence it ap- 135. pears, that such persons are incapable to grant; for according to Palm. 254. *Co. Lit.* nothing passes by grant, but that which may lawfully pass, Poph. 83. which in case of a *non compos* is nothing. In case of a feoffment and livery by the proper hand of a *non compos* the estate passes by the livery, and is only voidable by the heir; but if the feoffment be made by letter of attorney to deliver seisin, it is void. 4 *Co.* 125. and all cases of grants by them are void. As if *non compos* grants a rent charge, and delivers seisin with his own hand, it is void; and if the grantee distrains, he is a trespasser. *Park. fol.* 5. *sect.* 21. And therefore the surrender in this case is void.

Northey contra for the defendant, that the deed was only voidable. 1. It is not void against himself; he could not avoid it by entry, or pleading, or by writ of *dum non fuit compos*, &c. *Co. Li.* 247. And it would be strange, that it should be void against all the world, but himself, who is prejudiced by it. The law favours infants more than *non compos*, for infants may avoid their own acts; yet in case of a bond, because it carries the consideration upon the face of it, they shall not plead *non est factum*, and give infancy in evidence; which shews that it is not void. *Contra* of *femes covertes*. Suppose that the *non compos* had come to his under-
4 L
standing

Contingent
remainder de-
stroyed.

standing again, and had consented to this surrender, it had been unavoidable. *Co. Li. 2. b.* which could not have been if the deed had been void. It appears also by the writ of *dum non fuit compos*, that the alienation is not void, because the writ supposes, that the party *dimisit*. So by the writ *de idiota inquirendo*, and the statute *de praerogativa regis*. And if the deed was void, the law had no need to prescribe these methods to avoid it. Then the deed was only voidable, and passed the estate for the life of *Simon Leach*, which destroyed the contingent remainders; and there is an end of the plaintiff's title. A future right of entry will not support a contingent remainder, but a present right of entry will support it well enough. *1 Vent. 188. Loyd v. Brooking. 1 Mod. 92. Zouch v. Clare. 1 Cro. 102.* And if the contingent remainder be once destroyed it will never rise again. *2 Saund. 387.* See *3 Keb. 2. Cole v. Levingston.* A man destroys a contingent remainder by levying of a fine, afterwards the fine is annulled by act of parliament; and it was held, that the contingent remainder was revived. But if it had been reversed for error, it had been otherwise. This was cited by *Northey*, as held by *Hale* chief justice *Mich. 24 Car. 2. B. R.* in the case of *Cole v. Levingston.* And *per Holt* chief justice, if the deed is good, the contingent remainder is destroyed. For there ought to be, either a particular estate actually *in esse*, or a present right of entry, when the contingency happens, or otherwise it cannot vest. If there be tenant for life with a contingent remainder; tenant for life makes a feoffment in fee upon condition; if the contingency happens, before the condition is broken, the contingency is destroyed; but if the tenant for life enters for the condition broken, before the contingency happens, the contingent remainder shall be revived, and the contingency, if it happens, may vest. But if before the contingency happens, the reversioner enters upon the tenant for life for the forfeiture, the contingent remainder is destroyed.

Afterwards in this *Hilary* term serjeant *Gould* argued for the plaintiff much to the same purpose with *Wright* serjeant here above. But farther he moved a new point, *viz.* admit that the deed was only voidable, whether the right remaining in the *non compos* was not sufficient to support the contingent remainder. For though the *non compos* is disabled by a maxim of law, to re-vest his right, yet the King by inquisition might avoid the deed. And *Fitzb. remitter 23. Fitzb. Nat. B. 203. a.* it is held, that if *non compos* makes a feoffment in fee, and takes back an estate for life, he is remitted, as is admitted there by the issue.

Darnall serjeant for the defendant argued to the same purpose with *Northey*; but only he took a distinction between a grant made

made by *non compos*, and an authority given by him; that the grant was but voidable, but in case of a feoffment by letter of attorney it was void; because infants or *non compos* cannot give an authority. *Perkins, sect. 139. 2.* He said that there cannot be any right, nor *scintilla juris*, in the King, to support the contingent remainder; because if no office be found in the life of the *non compos*, no office can be found after his death.

But as to the difference between a grant and an authority the court said, that it would be very strange, to allow a *non compos* power to do a greater thing, which may be prejudicial to him, and yet not to allow him power to give an authority.

And *Holt* chief justice, and all the other judges were of opinion, that this deed of surrender made by *Simon Leach* the *non compos* was absolutely void. The cases of infants and *non compos* are parallel in all things, except that a *non compos* cannot stultify himself, to avoid his grant. Now the surrender of an infant is adjudged void. *1 Cro. 502. Lloyd v. Gregory*, which is a case in point; for there is the same reason, that the surrender of a *non compos* should be void. If an infant grants a rent-charge, the grantee distrains, the grantor may maintain trespass. The same law of *non compos*. *Perk. sect. 21.* which proves the grant to be void; for if it was only voidable, some act ought to be done to avoid it. And where it is said in *5 Co.* in *Whelpdale's* case, that the deed of an infant is not void, but voidable; the book only means, that the infant shall not plead *non est factum*, and give infancy in evidence, but shall plead his infancy specially; because the deed to all appearance has all things necessary to a deed, and seems to be justly executed, but for some latent cause has no operation in law; which cause ought to be shewn whereby it may appear to be ineffectual. In the same manner if an infant makes a letter of attorney, it is void, but he cannot plead *non est factum*. So if *non compos* makes a letter of attorney to make livery upon a deed of feoffment he cannot avoid it, no more than if he had made a feoffment in person, yet the feoffment is void. But the reason why feoffments of infants and *non compos* are voidable only, proceeds from the solemnity of livery of seisin in the sight of the country, which takes notice of the notorious alteration of the possession. But *contra* of a deed, which may be delivered in a private manner. As to the objection of the writ of *dum non fuit compos*, &c. which hath the word *dimisit*. Answer, That means only a feoffment with livery by himself; for feoffments and fines were the ancient conveyances, and the only conveyances used in those days. And for these reasons all the judges were of opinion, that this surrender was void, and that all strangers might take advantage of it, and

Deed by *non compos* void.

Infant.

2 Leon. 218.

Feoffment of infant or *non compos*.

and that the estate remained in *Simon Leach* notwithstanding; and so the contingent remainder vested in the lessor of the plaintiff, before the particular estate determined.

But *Holt* chief justice, as to the point made by serjeant *Gould* of the right in the *non compos*, &c. said, that if the case had depended upon that, much might be said in its behalf; for in the case in the book of *Affises* it is admitted that it was a remitter, by the joining of issue upon the being *non compos*. And it is not for default of right, that the *non compos* cannot avoid his own feoffment, but by reason of a personal incapacity, viz. that no man shall be admitted to stultify himself. And judgment was given for the plaintiff, *nisi*, &c. And afterwards error was brought upon it in parliament, and the judgment was affirmed.

Contingent
remainder.

Freeman 508.

Note; It was said by *Holt* chief justice in this case, that a right of action will not maintain a contingent remainder. Therefore if *A.* be tenant for life, remainder in contingency, *A.* is disseised, and a descent cast, and now since the statute 32 *Hen. 8. cap. 33.* if five years be past, the right of entry is changed into a bare right of action, and the contingent remainder is destroyed. The case of *Biggot v. Smith*, 1 *Crq.* 102. is nice to an instant, for the right ought to be precedent to support the contingency; and therefore there, because the right arose to the wife *eo instante* that the contingency happened, the remainder was adjudged to be destroyed; and the case has been always held for law.

Smith vers. Westall.

S.C. 3 Salk. 9.
Statute of
brokers, 8 &
9 Will 3. c.
32. §. 10.
Post. 673.

Statute of
frauds.
Comyns 49,
50.
T. Jones 108.

IN a statute made the last sessions of parliament for regulation of brokers, there is a clause which makes all contracts for transferring of bank-stock void, which by the tenor of the agreement ought to have been performed after the first of *May*, unless they are performable within three days, &c. Upon which this case was thus: An agreement was made in *February* by *A.* with *B.* that *A.* should transfer bank-stock to *B.* upon the request of *B.* at any time before the tenth of *May*. And Mr. *Northey* urged, that because this contract might have been performed before the first day of *May*, therefore it was not within the words of the statute. And he compared it to a case upon the statute of frauds, where the agreement was, that *A.* in consideration of 5 *l.* paid by *B.* should pay to *B.* 20 *l.* upon his day of marriage, and the promise was not in writing; and it was held by the judges at *Serjeants inn* to be out of the intent of the statute, and good, because it might have been performed within the year. *Holt* chief justice granted,

granted, that the case of the marriage was so adjudged; and he said, that if the marriage had taken effect within the year, they all agreed no writing was necessary; but in the case before them the marriage did not happen within the year, but nine years after the promise; and therefore he was of opinion that it ought to have been in writing, because the design of the statute was, not to trust to the memory of witnesses for a longer time than one year; but the majority of the judges were of opinion that it was not within the intent of the statute of frauds, and therefore he returned the *poslea* accordingly, the cause being tried before himself. But to the case in question, he was of opinion, that if the request had been before the first of *May*, and the contract performed, it had been good; but if no request was made before the first of *May*, the contract being performable afterwards, was within the intent of the act. And in fact no request appeared to have been made before the first of *May*. And therefore judgment was for the defendant, who had pleaded the act of parliament.

Morris vers. Gelder, &c.

REplevin. The defendant avows for rent arrear, and so many S. C. Carth. hens, for quit-rent. Verdict for the avowant for the rent, and ^{437.} damages for the hens. And now it was moved in arrest, that it ^{Error in a-} appeared upon their own avowry, that they had avowed for more ^{vowry aided} hens than were due, and for this reason the avowry was ill. And ^{by a release,} Mr. *Hall* moved for the avowants, that releasing the damages for ^{and the avow-} the hens, they might have liberty to enter judgment for the rent ^{ant recovers} and costs. And he cited the case of *Buis v. Newton*, *Trin.* 28 ^{costs.} *Car.* 2. rot. 728. *B. R.* Ejectment for a forest and other lands; ^{Buis v. New-} upon not guilty pleaded, verdict for the plaintiff for the whole; ^{ton.} and because an ejectment did not lie *de foresta*, the plaintiff released ^{1 Sid. 295.} it, and entered judgment for the rest, and his costs. But on the ^{Banbury v.} other side 3 *Cro.* 186. was cited as in point. But, *absente Holt* ^{Yeomans.} chief justice, the court gave leave to the avowant to enter his judgment as he desired, *nisi*, &c. Mr. *Jacob*.

Brewster vers. Kitchen.

IN a feigned action upon the case, upon a wager whether it was S. C. 1 *Salk.* lawful for the defendant to deduct 4s. in the pound out of a ^{198.} certain rent-charge granted to the plaintiff's ancestor out of certain ^{5 Mod. 368.} land in *Bucks*, of which the defendant was *terre tenant*, which tax ^{Carth. 438.} of 4s. in the pound was granted to the King and Queen in 4 & 5 ^{S. C. 12 Mod.} *Will.* & *Mar.* by act of parliament; the defendant affirmed that it ^{169, 171.} ^{Comb. 424,} ^{467.}

was lawful for him to deduct, and the plaintiff affirmed that it was not. Upon which issue being joined, a special verdict was found, that *Robert Langford* being seised in fee of the manor of *Ballmore* in *Bucks*, by indenture dated 26 November 1649. for and in consideration of 800*l.* paid to the said *Robert Langford* by *Ellen Brewster*, granted to her a rent-charge out of the same manor to her and her heirs, and in the deed there was a covenant to make farther assurance; and this memorandum was indorsed upon the deed, viz. It is the true intent and meaning of these presents that the within named *Ellen Brewster* and her heirs shall be paid the said rent-charge without deduction of any taxes for the said rent, &c. Afterwards *Robert Langford* in pursuance of the covenant in the first deed confirms the rent to *Ellen Brewster* and her heirs, payable at two feasts, with a *nominae poenae*, and covenants that he was seised of a good estate in fee in the lands charged, &c. free of all incumbrances (except some leases there specified upon full rent reserved, &c.) and that the rent should be paid at the said two feasts, free of all taxes; and this was by deed bearing date 8 July 1652. *et si*, &c. After several arguments at the bar by Mr. *Northey* and Mr. serjeant *Wright* for the plaintiff, and by Mr. *Cowper* and for the defendant, *Holt* chief justice pronounced the opinion of the court. And (by him) the question is upon this special verdict, whether the covenant indorsed upon the deed of 26 November 1649, or the covenant in the deed of 8 July 1652, be sufficient to bind the grantor and his heirs to pay the rent free of all taxes, hereafter to be charged upon it by act of parliament. And all the judges were of opinion, that this covenant binds the grantor and his heirs to pay the rent, free of the 4*s.* in the pound tax. And *Holt* chief justice said, that it has been an old question, whether such a covenant should extend to taxes to be imposed by act of parliament? And if the covenant be understood in the largest extent of it, and as in a general case, he was of opinion that it would not; but as the circumstances of this case are, he was of opinion that it would, for these reasons. 1. When taxes are generally mentioned, they must be understood parliamentary taxes, if the subject matter will suffer it. *Brook quinzime* 9. There are other impositions, which are called taxes, as rates for the poor, by 43 *Eliz. cap. 2.* 5 *Co. 65.* *Jeffrey's case*; and assessments by commissioners of sewers, 23 *Hen. 8. cap. 5.* and generally any thing that affects any part of the goods of a man, or the rents of his lands, by taking them away, as it is explained by my lord *Coke* upon the statute *de tallagio non concedendo.* 2 *Inst.* 532.

Taxes, what?

See a case determined on the authority of this opinion *Dough* Rep. 602.

Another reason that influences this case, is the time when this rent was granted, viz. 1649. at which time taxes of this nature had obtained in the kingdom; for the manner of taxing by monthly assess-

assessments began since the civil wars; for in 1642 men were taxed by monthly assessments, and there was the same clause in those acts for the tenant to deduct as in these of this time. But if the covenant had been made in 1640, it had not extended to these taxes, because then this sort of taxes was not known in the kingdom, and therefore a man cannot be supposed to comprehend them in a covenant without the spirit of prophecy; but this way being introduced, it is natural to suppose that the party made provision against them by this covenant.

The old methods of taxing were,

1. By tenths and fifteens.
2. By subsidies, specially so called.
3. By assessments and royal aids, which are different names for the same thing.
4. And at last by a pound rate.

Tenths and fifteens were the most ancient, as appears in *Spelm. glossar. quindecima*. 4 *Inst.* 34. 2 *Inst.* 76, 7. They were anciently taxed upon the head of every one. And afterwards in 8 *Edw.* 3. this was altered, and valuations were made upon all the cities, towns and boroughs in *England*; and this valuation was returned into the Exchequer; and that was made the certain rule for the taxing of every town, &c. so that when a tax was granted, they might compute by the roll in the Exchequer to what sum it would amount. When the towns were taxed by parliament, they among themselves taxed all the occupiers in the town (who were taxed as they held at rack rent) according to the value of the land which they had within the towns, for raising the tax upon such town. 11 *Hen.* 4. 35. *b. Brook. quinzime* 9. And this was the general usage, though it was not universal. Now this present covenant could not have affected that sort of taxes; for the rent was not taxed, but the land only as part of the town, to complete the value of the town, and the *terre tenant*, as he who was in possession, to pay the tax. Tenths and fifteens, how taxed.

Afterwards subsidies were introduced, the first mention of which is 32 *Hen.* 8. *cap.* 50. which were taxes imposed upon the person for his land and goods according to the best value; which being paid by the person where he lived, could not affect this covenant, for the grantee ought to pay for the rent where he lived, and so there could be no deduction for the tenant. And this sort of taxes Subsidies.
con-

continued until 17 *Car.* 1. and an endeavour was made to introduce them again in 15 *Car.* 2. but they were found to be less beneficial to the King than the assessments used in the civil wars. But in those assessments there was always this clause about deductions. So that this deed being made in 1649, the intent appears to have been, to make provision for ever after against deductions to be made by the tenant. These assessments were frequent before the making of this deed. There was one in *February* 1642, another *February* 1644, and two others in 1649, and one which was in force at the time of the making of this deed, another 1653, another 1656. And it is no objection, to say that these assessments were not created by lawful authority; for they had the reputation of legality, and the people submitted themselves to them, which might be sufficient reason to induce the grantee to secure himself against them.

How grantable.

2. Though taxes cannot be granted but by act of parliament, and though they have no formal existence until they are granted; yet they have a virtual existence before, and are known in law; for it is well known, that the constant revenues of the crown are not sufficient to supply all the extraordinary exigencies and emergencies of the crown without these aids, to grant which is part of the constitution of the government. And therefore it was natural to suppose, that such a thing might happen, and to provide against it. For taxes upon necessary occasions are due to the crown *ex merito et debito*; and though they cannot be levied in any other manner, than as the parliament appoints, as appears by 1 *Edw.* 3. *ft.* 2. *cap.* 6. yet supplies are due to the King. 19 *Hen.* 6. 68. 38 *Hen.* 6. 10. 21 *Edw.* 4. 45. where it is held, that a grant by the King to *J. S.* to be discharged of taxes, to be imposed at any time after by parliament, is good. For unless taxes had had a virtual existence in the constitution of the government, the King's grant could have nothing, upon which it might operate, and would have been void; but the contrary is adjudged, that the grant was good; and the reason is given in *Dier* 52. *a. pl.* 2. because the King hath an inheritance in taxes and subsidies to be afterwards granted.

Inheritance in taxes to be afterwards granted.

Assignee takes advantage of the covenant.

3. This covenant extends to all future acts, for it is, that *Ellen* and her heirs should be free, which is in fee; and her assigns of the rent might take advantage of it; for as the estate was in fee, so the covenant is co-extensive with the estate, and is in fee also. And therefore it is as strong, as if it had been to be free from all taxes to be imposed by any act whatsoever.

A doubt has been conceived, that the clause in these new acts, for the tenant to deduct, &c. would have destroyed such a covenant

nant as this, if it had not been provided by the acts, that this clause should not extend to make void any covenants or agreements between landlord and tenant; but he was of opinion, that such provision was not absolutely necessary, 1. Because these taxes lately assessed are subject matter for the covenant, and therefore though the act allows the tenant to make a deduction, that could never be a repeal of the covenant, because it is the thing upon which the covenant is grounded, and against which it provides. 2. This provision for the tenant to deduct is for his advantage, which he might well waive by covenant, since he might well foresee it by the usage of the times; and a man may as well waive the benefit of a future law, as of a law already made. 3. The tenant might well pay his rent without deduction, and not violate the law. For the difference, where an act of parliament will amount to a repeal of a covenant, and where not, is this; where a man covenants not to do a thing which was lawful for him to do, and an act of parliament comes after, and compels him to do it; there the act repeals the covenant; and *vice versa*. *Dier* 27. *pl.* 178, 186, 7, 8. But where a man covenants, not to do a thing, which was unlawful at the time of the covenant, and afterwards an act makes it lawful; the act does not repeal the covenant. *Dier* 48. *pl.* 5. So here, since the act does not compel the tenant to deduct, the act leaves the covenant in full force. 4. This clause was only inserted, to expedite the payment to the crown; and where an act of parliament is made for a particular purpose, it will not extend to collateral qualities. 8 *Co.* 138. *Barrington's* case, 19 *Hen.* 6. 62. a strong case, where a grant to be free from a future tax was allowed by all the judges. And in the several acts for subsidies in 37 *Hen.* 8. *cap.* 25. and 1 *Edw.* 6. *cap.* 12. such grants are mentioned, and saved to the grantees for the future. This covenant was dispensed with by the 22 *Car.* 2. in which there was a clause for deduction notwithstanding any covenant, &c. but there are no such words in the act, which concerns this case.

Waiver.

3 Mod. 39.

Covenant repealed by act of parliament.

Statute.

Objection. General words shall not extend to any thing provided to be done by a subsequent act of parliament. 2 *Co.* 47. The case of the archbishop of *Canterbury*.

Answer. That the ground of *Coke* is not universal; and the reason of the case there was, because those monasteries that came by 1 *Edw.* 6. *cap.* 14. were vested in possession by the act of *Edward* 6. exclusive of any other act; and therefore it is in that respect a repeal of 31 *Hen.* 8. *cap.* 13. though it might have been well enough done within the general words [of means] and that is the reason of the case aforesaid, as is said in *Jones's Reports* in the case of *Whitton v. Weston* 182. and if these words [shall be by the

4 N

authority

authority of this present parliament vested, &c.] had been omitted, those lands would have been exempt from payment of tithes by 31 Hen. 8.

Objection. It is a tax by the pound-rate, and not by way of assessment; and therefore it is a new tax, and could not be provided against.

Answer. It is the same sort of tax; though it is not a monthly assessment; and differs not in substance, but in form. The same things are taxed; there is the same clause of deduction; and the tax is for the same purpose, for the King's supply. If it had been for rebuilding *Paul's* church, then it had been out of this covenant; but since it is as it is, he was of opinion, that the covenant extended to these taxes, and the grantor and his heirs ought to pay the rent without deduction.

Covenant against assignee.

Warranty.

Circuity of action.

But he then made another question, which was not observed at the bar nor by any of the other judges, *viz.* whether the *terre-tenant* is liable to an action upon this covenant; and he was of opinion, that he was not. For (by him) if tenant in fee grants a rent-charge out of lands, and covenants to pay it without deduction, for himself and his heirs, you may maintain covenant against the grantor and his heirs, but not against the assignee; for it is a meer personal covenant, and cannot run with the land. Warranty, which is a real covenant, will never bind the land of the warrantor, until judgment had in *warrantia chartae*; much less will this personal covenant bind the land. And for a case in point he cited *Hardr.* 87. pl. 5. *Cook* and the earl of *Arundel*. In replevin if the defendant had avowed for arrears of this rent, and the plaintiff had pleaded in bar, *riens arrere*; the avowant could not have replied this covenant against the *terre tenant*; but if the avowry had been upon the grantor, or his heirs; the avowant might have replied this covenant against them, to avoid circuity of action. Therefore since it does not appear, that the defendant is bound by this covenant (for *non constat* whether he is *terre tenant* or not, or what he is) for this reason he was of opinion, that judgment ought to be given for the defendant. But the other three judges seemed to be in a surprise, and not in truth to comprehend this objection, and therefore they persisted in their former opinion, talking of agreements, intent of the party, binding of the land, and I know not what. They gave judgment for the plaintiff, against the opinion of *Holt* chief justice, for the reason aforesaid.

Rex *vers.* Sanchee.

Sanchee and others, quakers, were cited into the ecclesiastical court, to answer there upon their solemn affirmation, &c. concerning tithes withheld by them from the parson of the parish; and for not answering, the commissary, according to the statute of 27 Hen. 8. cap. 20. certifies their contumacy to two justices of peace, by whose warrant they were seised, and committed to prison; and being brought by *habeas corpus* into the King's Bench, Mr. Robert Eyre moved, that they might be discharged. Because the new act concerning the affirmation of quakers gives the parson a remedy to recover such tithes by distress by virtue of a warrant of a justice of peace; then where a statute gives remedy, the jurisdiction of the spiritual court is taken away, unless it be saved by the same statute. 5 Co. 73. b. *Jones* 320. And he cited several statutes, where the jurisdiction of the spiritual court was saved, as 23 Eliz. cap. 1. 1 Eliz. cap. 2. In the same manner in the statute against usury, 3 Inst. 152. 2 Inst. 657. And from thence he inferred, that it was the opinion of those parliaments, that the spiritual jurisdiction would have been taken away by these acts, if it had not been saved by them. But *per curiam* this last act seems to be only an accumulative remedy, and not to repeal the act of Hen. 8. And in many cases the common law and ecclesiastical courts have concurrent jurisdiction; as if a pension be payable out of a parsonage by prescription, the remedy for this is either in the spiritual court, or annuity lies for it at common law; though *Coke* says the contrary in his second institute in his comment upon the statute *de circumspēte agatis*. But where the nature of the offence is altered by a statute, and a new penalty inflicted; then after the party has been tried at common law and condemned, the ecclesiastical court shall not proceed against him. As if a man be convicted at common law for having two wives, or hath been adjudged the reputed father of a bastard son, &c. But then *Northey* took exception to the return, because it is said, that *Sanchee*, &c. were imprisoned for contempt in a suit for detention of tithes or other ecclesiastical duties; and it ought to appear, for which the suit was, specially. For though the statute that gives this remedy is in general words, yet in the return the cause of imprisonment ought to be certainly expressed, to the end that it may appear to the court, that it was an ecclesiastical duty, for which they are imprisoned. And of this opinion was the whole court, and therefore the quakers were discharged out of custody.

s. C. Holt
657.
Cases in B. R.
165.
Quakers com-
mitted upon
27 Hen. 8.
cap. 20.

7 & 8 Will. 3.
cap 34.

Common law
and spiritual
court have
concurrent ju-
risdiction.

2 Inst. 491.
1 Vent. 3.
120, 265.

Commitment
uncertain.

Petray *vers.* Sir Austin Palgrave.

Specification
wanting can-
not be suggest-
ed after judg-
ment.

SIR *Austin Palgrave* recovered judgment in debt in C. B. against *Petray* upon a bond; upon which *Petray* brought error. And now Sir *William Williams* moved, that the plaintiff in error might have liberty to suggest, that the bond was not specified according to the capitation act. But *per Holt* chief justice, he should have pleaded it in the Common Pleas before judgment, but now after error brought he comes too late; and therefore the motion was denied.

Burgess *vers.* Periam.

Memorandum
not amenda-
ble after re-
spondee ouster
awarded.
Post. 683.
1 Salk. 451.
5 Mod. 327.

THE plaintiff brought a special action for not delivering bank bills upon the first of *May* in pursuance of an agreement; but the memorandum was general of *Easter* term last past, which referred to the first day of the term; and so the action appeared to be brought before the cause of action accrued. Wherefore Mr. *Nortey* moved for leave to amend the memorandum, and make it, *die Mercurii proxime post mensem paschae* (which was after the cause of action accrued) upon affidavit, that all the process issued after the first day of *May*. And this motion was made after the defendant had pleaded in abatement, and a *respondee ouster* awarded upon it, and demurrer by the defendant for this cause. But the motion was denied by the court, because it comes too late, though all was in paper.

Miller *vers.* Trets.

Mich. 9 Will. 3. Exchequer Chamber.

Imperfect ver-
dict.

INformation was exhibited against the defendant by the plaintiff in the court of Exchequer, for selling lace and silks, &c. Upon issue joined the jury find the defendant guilty as to the selling the lace, &c. but say nothing as to the silks. And judgment in the Exchequer for the informer. And upon error brought this omission of the jury in the verdict was assigned for error. Upon which a motion was made in the Exchequer for leave to amend; but denied, because it was not amendable. And therefore the judgment was reversed here.

Hilary

Hilary Term

9 Will. 3. C. B. 1697.

Sir George Treby Chief Justice.

Sir Edward Nevill

Sir John Powell

Sir John Blencowe

} *Justices.*

Ayres vers. Falkland.

Ejectment. Upon a special verdict the case was thus. *A.* S. C. 1 Salk. possessed of a term for ninety-nine years devised it to *B.* 231. for life, and after to six others successively for their lives, 3 Danv. Ab. 170. p. 9. if the said term should so long continue. All the seven persons being dead, and the term continuing, the question was, whether the residue should go to the executors of the testator, or to the executors of the last devisee. It was objected, that as there cannot be a remainder of a term; for the same reason there cannot be any reversion left in the first testator, but that the intire term was in the last devisee, and consequently would descend to his executors. 1 *Brownl.* 41. *Moor* 748, 635. *Bro.* Sid. 37. Salk. 225. *chattels* 23. 2 *Ventr.* 126. 2 *Sid.* 130. 1 *Sid.* 37. 1 *Roll. Abr.* 1 *Sid.* 451. Di. 358. 611. pl. 1. 1 *Sid.* 415.

Sed tota curia contra. For *per Treby* chief justice and *Powell* Executory devise. justice, these executory devises depart from the rules of the common law, and are allowed in compassion to families, for whom provision is now generally made by terms and leases. Therefore one must not have too great retrospect, to search for rules of construction in such cases. At the beginning these devises were opposed; for when *A.* possessed of a term for years devised the term to *B.* for life, remainder to *C.* the remainder to *C.* was held void, because the term was intire, and comprised the whole interest, as much

much as if he had devised a fee ; and so the term being intirely in the first devisee, nothing was left to remain to the second ; besides, that a term for years was looked upon as a less interest than an estate for life. Afterwards, to surmount this difficulty, this expedient was found out in *Matthew Manning's* case, that there should be a transposition, and that the latter devise should be construed to pass first ; for doubtless a man might devise a term to *A.* after the death of *B.* and upon such a limitation the devisor is not excluded from the disposition of the mean interest, which he has not disposed, for the interval of the life of *B.* And therefore if a term for years be devised to *A.* for life, remainder to *B.* by construing this a devise to *B.* after the death of *A.* and that *A.* should have it in the mean while, it was allowed good. But if *A.* devises a term for years to *B.* in tail, remainder over ; this remainder is limited to commence upon a possibility too remote, and therefore the law will not wait for it. The same law if *A.* devises a term to *B.* and if he dies without issue, remainder to *C.* this remainder is also too remote. But when the limitation is to *A.* for life, remainder to *B.* *A.* in probability may die before the term determined. And therefore all the remainders in the present case at bar were held good. But forasmuch as the first, and afterwards every one of the seven devisees in their respective turns had the intire term, during the life of the first devisee the whole term was in him, and the second had but a possibility, *et sic de ceteris.* For as there might be a possibility of reverter at common law, so in these cases there is a possibility of remainder. Then as a possibility of remainder may be limited over in these cases, so it may be reserved ; and if it be not disposed, it shall be left in the devisor ; for that which a man has in him, and does not dispose from him, remains still in him. Besides, that a man may have a possibility of reverter, where he cannot limit a remainder ; as if *A.* gives lands to *B.* and his heirs during the time that such an oak shall grow, he hath a possibility of reverter, though no remainder can be limited. From whence it follows ; that the residue of the term in this case after the death of all the seven devisees must revert to the testator and his executors. And judgment was accordingly for the defendant, &c.

Bates *vers.* Bates. Dower.

S. C. 1 Salk.
254. 291.
Lutw. 719.
1 Leon. 92.

DOWER. The tenant pleads, that the husband *ne unques fuit seisie que dower* Upon which issue being joined, the jury find, that *Ralph Bates* husband of the demandant was seised of the lands now demanded for life, remainder to *A.* and *B.* trustees for life, remainder ninety-nine years, remainder to the heirs of the body of *Ralph* to *A.* for 99 years, remainder to *B.* in tail, the wife of *B.* shall be indowed.

Bates, &c. et si, &c. And it was argued for the demandant, that the husband died seised of an estate tail executed; for the intervening estate being for years, ought not to be regarded. That the feoffment of the husband would have discontinued the intail, which proves that he was seised of it. See 2 *Bulstr.* 29, 30. *Raym.* 126. 1 *Roll. Abr.* 632. *B. pl.* 2. *Cro. Car.* 320, 1. and that his warranty would have been lineal to a son, which proves that the son is in by descent. *E contra* it was urged for the tenant, that dower was allowed by the law for support of the wife and her children; and therefore where by such allowance the wife and her children cannot be supported, no dower can be allowed, for *lex non facit inutilia*. Then dower in these cases, where the *mesne* term might be for a thousand years, would be so remote, that it would be of no avail to the wife. And as to the objection, that the heir was in by descent; it was answered, that that signifies nothing, because if the intervening estate had been for life, the heir had been in by descent, and yet in such case without doubt the wife is not dowable. This case was thrice argued at the bar, and at the first argument the court doubted, because the estate tail is so disjoined by the intervening lease, that though it be vested, it is not executed; and perhaps (they said) the feoffment of the husband would not have discontinued the entail. At the second argument *Treby* chief justice was of opinion for the demandant, because at the instant of the death of the husband there was but an estate for years in the trustees, and the estate tail was in the husband; and (by him) the instant should be divided in favour of dower, as 3 *Cro.* 503. *Broughton v. Randall*. But upon the third argument judgment was given for the demandant upon this reason, because the husband had a freehold and inheritance in him, and the intervening estate, being only for years, ought not to be regarded. For at common law such a term was a precarious thing, the freeholder might have destroyed it as his pleasure by a feigned recovery. A descent, which tolls an entry, does not disturb a term; and if tenant for life commits waste, such an intervening term will not obstruct the action of waste, as an intervening estate of freehold would do. And therefore all the court was of opinion, that such intervening term would not hinder dower, as it would have done if it had been an estate for life, according to the opinion of *Perkins* 336. the only authority in the books for that resolution. Judgment was given for the demandant.

Easter

Easter Term

10 Will. 3. B. R. 1698.

Sir John Holt Chief Justice.
 Sir Thomas Rokeby }
 Sir John Turton } Justices.
 Sir Samuel Eyre }

Burr v. Atwood, and Drue v. Atwood.

S. C. 1 Salk.

89, 402.

Farr. 3.

5 Mod. 397.

Carth. 447.

Lill. Ent. 225.

3 Salk. 369.

7 Mod. 3.

Post. 553.

Error brought

by bail tam,

&c. quam, &c.

quashed in
part.

Brook v. Ellis,

1 Salk. 363.

Error brought

by an executor

to reverse the

principal

judgment

against him-

self and his

partner, and

the judgment

in scire facias

upon a deva-

stavit against

himself, quash-

ed in part.

Atwood obtained judgment in an action against *J. S.* in which *Burr* was bail; and afterwards he obtained judgment in *scire facias* against *Burr*; upon which *Burr* brought a writ of error, *tam in redditione judicii quam in adjudicatione executionis*; which was ill, because the bail cannot maintain error upon the principal judgment. Upon which Mr. *Carthew* moved, that the writ of error should be quashed as to the principal judgment, and stand good as to the judgment upon the *scire facias*. And he cited a case adjudged in this court, *Pasch. 5 Will. & Mar.* between *Brook* and Sir *William Ellis*, where Sir *William Ellis* obtained judgment in debt against *Brook* and *J. S.* two executors of *J. N.* and upon a *scire fieri* inquiry awarded, and *devastavit* returned against *Brook*, judgment was given against *Brook* upon the *devastavit*; upon which *Brook* sued a writ of error without his co-executor *J. S.* to reverse the principal judgment in the action of debt, and to reverse the judgment of the *devastavit* against himself; and because he alone without *J. S.* could not sue error upon the principal judgment, the writ of error was quashed as to that, and stood good as to the judgment in the *scire facias* upon the *devastavit* against himself; which case *Holt* chief justice remembered well. And therefore in the principal case the writ of error was quashed as to the principal judgment, and was retained for the residue.

Acourt

Acourt *vers.* Swift.

Pasch. 5 Will. 3 Mar.

UPON error brought in like manner by the bail upon a judgment in B. R. in Ireland held ill. But the court refused to quash it, because the transcript was not returned and filed. *Ex motione m'ri Northey.* Comb. 37. 2 Show. 487.

Brasfield *vers.* Lee.

IN trespass, assault, battery, and false imprisonment, the plaintiff declares, that the defendant assaulted, beat, and imprisoned the plaintiff, the first of October 9 Will. 3. and detained him in prison for four months. Upon not guilty pleaded, verdict for the plaintiff, and intire damages were given by the jury. And now serjeant Darnall moved in arrest of judgment, that the declaration was a declaration of Michaelmas term 9 Will. 3. and therefore the damages being intire and given for the imprisonment of four months from the first of October, it appears that the damages were given for imprisonment after the action was commenced. And judgment was arrested. Damages after the action.

Doberteen *vers.* Chancellor.

Saturday May 21.

IN *assumpsit* the defendant pleads in abatement. And upon demurrer *respondes ouster* was awarded. And then the defendant pleads the general issue. And the *nisi prius* roll was prepared, omitting the plea in abatement. And being brought to the assises, verdict was given for the plaintiff. And now a motion was made to set aside the trial, because the plea in abatement was not entered in the *nisi prius* roll, and so the justices of assise had not proceeded upon the right record. And this being referred to the master to examine it, he made a report as aforesaid. And the verdict was set aside by all the judges upon examination of all the practisers of the King's Bench, and all the prothonotaries of the Common Pleas, what was the practice in such case; who all certified, that the constant practice is to have the plea in abatement entered in the *nisi prius* roll. S. C. Carth. 447. 5 Mod. 399. Nisi prius roll without the plea in abatement. Carth. 499. Post. 510. 2 Mod. 274.

Canter *vers.* Shepheard.

S. C. 5 Mod.
398.
Salk. 507.
Property.
6 Mod. 36.
2 Salk. 442.
3 Lev. 299.
3 Mod. 86.
Molloy lib. 2.
cap. 10.

IN trover and conversion for a goldsmith's note of 100 l. upon the general issue pleaded, upon evidence at the trial, the case appeared to be thus. *Canter* had a note for 100 l. of *Shepheard*, which *Canter* carried to *Shepheard*, and delivered it to him, to receive the 100 l. At the same time Mr. *Dale* brought 80 l. to *Shepheard*, to pay to him. *Shepheard* prayed *Canter* to count the 80 l. and receive it as part of payment, while *Shepheard* counted 20 l. out of another bag. *Canter* counted 50 l. out of the 80 l. and drew a bag out of his pocket, and put the 50 l. into the bag, and laid the bag with the 50 l. in it upon the counter by him, and proceeded to count the residue, during which J. S. took up the bag, and ran away with it; upon which *Canter* supposing, that this was not any payment to him, because the money was not carried out of the shop, and because it was liable to be counted again by *Shepheard*, refused to take the other 50 l. and brought trover for the note of 100 l. The matter appearing thus upon the evidence, it was reserved as a point by the lord chief justice *Holt*, before whom the cause was tried; and it was moved in B. R. and argued by counsel. After which all the judges were of opinion, that the plaintiff *Canter* ought to bear this loss of the 50 l. because the putting the 50 l. into his own bag was an appropriation of the money to himself; and the plaintiff might have brought detinue for the 50 l. in the bag. And therefore the verdict was for the plaintiff for 50 l. only, and judgment accordingly. Note, *per Holt* chief justice, at the trial the opinion of the jury was against the defendant for the whole 100 l. conceiving that this was no payment in the way of trade; and therefore they were ready to give a verdict for the plaintiff for the 100 l. if the chief justice had not been dissatisfied with it.

S. C. Carth.
448.
5 Mod. 405.
Vide 2 Saund.
252, 258,
393, 414.
1 Saund. 8,
229, 247.
Venue aided
by verdict,
tho' in a wrong
county, by
16 & 17 Car.
2. cap. 8.
2 Mod. 23.
Naylor v.
Sharpley.

Sir Richard Leving *vers.* Lady Calverly.

IN an action of covenant the plaintiff declares upon an indenture made in the county palatine of *Chester*, whereby houses in the city of *Chester* were demised to the defendant; and the breach assigned was, in not repairing the houses. The defendant pleads, that he repaired the houses in the city of *Chester*. And issue thereupon being joined, the record was sent by *mittimus* to the chief justice of *Chester*, and it was tried in the county at large. And after verdict for the plaintiff it was moved by Sir *Bartholomew Shower*, that this was a mis-trial; and being in a wrong county, it was not aided

aided by 16 & 17 Car. 2. cap. 8. But the record should have been sent by *mittimus* to the chamberlain of *Chester*, and he should have sent it by *mittimus* to the mayor of *Chester*, and so the trial should have been in the city. But Mr. *Chefbyre contra* argued, that this was aided by the 16 & 17 Car. 2. And for authority he cited the case of *Craft v. Boyte*. 1 Saund. 246. and a case between *Jew* Jew v. Briggs, and *Briggs* adjudged since the revolution, where an action was 3 Lev. 394. brought for an escape against the warden of the *Fleet* in *Middle-* Tr. 3 Will. & sex; the defendant pleaded a recaption of the prisoner by fresh Mar. Rot. 763. pursuit in *Surrey*; and issue being joined upon this, it was tried by B. R. Kent v. a jury of *Middlesex*; and verdict for the plaintiff; and it was ad- Briggs, Hil. judged by three judges against the opinion of *Holt* chief justice, that 3 Will. & Mar. Rot. 326. this was aided by the statute; and afterwards error was brought upon this judgment in the Exchequer chamber, and this mis-trial assigned for error; and all the judges, except *Treby* chief justice of the Common Pleas, *Powell*, and *Lechmere*, were of opinion to affirm the judgment, and the judgment was affirmed; and afterwards *Treby* chief justice declared in the Common Pleas, that he would submit to the opinion of his brothers; and therefore though this construction were very difficult to be maintained, if it were *res integra*, yet since these authorities, and others which he cited, were so, he desired that the plaintiff might have his judgment. And afterwards *Holt* chief justice said, that he would conform to so many authorities, though he believed they could not be maintained by reason. For (by him) the intent of the statute was according to the distinction in *Saunders* 246. But in respect to the T. Jones 82. multitude of cases he complied. And judgment by the whole court 3 Keb. 654. was given for the plaintiff. 3 Lev. 394. *Hunt's* case.

Silly *vers.* Dally.

Intr. Hil. 9 Will. 3. B. R. Rot. 747.

REplevin. The defendant made consuance as bailiff to *John* S. C. Carth. *Treaceagle*, and said, that the 31 July 1645 *John Treaceagle* 444. grandfather to *John Treaceagle* aforesaid was possessed of and in one Salk. 562. mesuage, &c. *pro quodam termino quingentorum annorum computan-* S. C. 12 Mod. *dorum a tricesimo die Julii anno illo*; and that he being so possessed, 190, 1. 6 Mod. 223. the said 31st day of July made a lease of the said mesuage for the term of 499 years, three quarters of a year, two months, and three weeks, to *John Carter* and *Richard Carter*, their executors and administrators, rendring rent; that *John Treaceagle* made his will, and *J. N.* his executor, and died; that *J. N.* made his will, and *John Treaceagle* (to whom the defendant is bailiff) executor; and for rent arrear the defendant avows the taking of the cattle, being upon

upon the premises, as a distress, &c. The plaintiff demurs. And Mr. *Cartbew* for the plaintiff argued, that the conusance is ill, because the commencement of this term is not shewn, viz. out of what estate it was derived; for when a particular estate is pleaded in a plea, avowry, or replication, the commencement of it ought to be shewn. *Co. Li.* 303. *b. Mar.* 1. 2 *Edw.* 4. 11. 9. *Cro. Car.* 571. *Scavage v. Hawkins.* *Yelv.* 147. *Witbam v. Barker*, and in a case between *Langford* and *Webber*, *intr. Hil.* 2 & 3 *Jac.* 2. *B. R. Rot.* 965. in trespass for cattle taken, the defendant pleaded, that he was possessed of a close for a term of years, and took the cattle there damage feasant; the plaintiff demurred generally; and it was adjudged for him, because no issue could be taken upon the *possessionatus*; which is a case in point. So in a case between *Saunders* and *Hussey*, *intr. Trin.* 8 *Will.* 3. *C. B. Rot.* 466. Replevin; the defendant avowed, that he at the time of the taking of the cattle *seisitus fuit et adhuc seisitus existit* of the place where, &c. and that he took the cattle there damage feasant, &c. The plaintiff demurred specially, because it was not said, of what estate he was seised; and (by him) the opinion of the court was, that the avowry for this reason was ill; and therefore the avowant paid costs, and amended; he was counsel in the case.

Langford v.
Webber,
3 Mod. 132.

Saunders v.
Hussey,
Lutw. 1231.

Saunders v.
Hussey.

Bradburne v.
Keneda,
Carth. 167.
3 Mod. 313,
320.

Note, I was present in court in the Common Pleas *Mich.* 8 *Will.* 3. 1696, when the case of *Saunders v. Hussey* was argued; and the case was thus; *Saunders* brought replevin for a taking of the plaintiff's cattle by the defendant in a place called *Eastfield* in *S.* The defendant avowed, that he at the time of the taking *seisitus fuit et adhuc seisitus existit de tribus acris terrae in Eastfield in quo* the taking is supposed to have been made, and that he took them there damage feasant. The plaintiff demurred specially, and shewed for cause, that the avowant had not shewn of what estate he was seised. And serjeant *Gould* for the plaintiff took exception to the avowry, that it did not answer the plaintiff's declaration; for the plaintiff declared of a taking in *Eastfield*, which extends to all the place called *Eastfield*, but the avowry was of a taking in three acres in *Eastfield*; so that the defendant (it may be) took the cattle in a part of *Eastfield* not parcel of the three acres, which the defendant could not justify. But the defendant should have said, that the *locus in quo*, &c. *continet tres acras*, and then have shewn his seisin of them, &c. And he cited a case between *Bradburne* and *Keneda*, *intr. Mich.* 4 *Jac.* 2. *B. R. Rot.* 640. and adjudged *Hil.* 2 *Will.* & *Mar.* which was a case in point; and there the court held it well enough upon a general demurrer, but that upon a special demurrer it had been ill. *Sed non allocatur.* For *per curiam* perhaps the very spot of ground, where the taking was had no name, and therefore it was sufficient for the plaintiff to shew

shew the name of the whole, which in fact was a common field, which he could not distinguish in parts. Then when the defendant justifies, he justifies the taking in the very spot by the number of acres, and he could not justify it otherwise; and therefore *per curiam* the avowry was well enough. Then Gould King's serjeant took another exception to the avowry, that the avowant had said, that he was seised, but did not say of what estate. Upon which Girdler serjeant argued, that the avowry was well enough notwithstanding that exception. Because, 1. *Additio probat minoritatem*, and therefore that seisin should be intended of a fee. But, 2. If it should not be intended a fee, yet it should be intended a freehold, for of a less estate a man could not be said to be seised. In *quare impedit* if a man declares, *quod seifitus fuit de manerio*, to which the advowson was appendant, it is good, 8 Hen. 5. 4. b. So in *quo warranto* the defendant says, *quod liberat. praedict. legitime habuit et gravisus fuit*; and good, 9 Co. 29. a. But admit that *seifitus* signified *possessionatus*; yet it would be good, because the avowant has the prior possession. And therefore it was adjudged, *Wright vers. Hardcastle*, B. R. lately, where the plaintiff brought trespass for taking his cattle, the defendant pleaded, that he was possessed of a market at *Leadenhall*, and ought to have toll, &c. and because the plaintiff did not pay the toll, he distrained the cattle; and there exception was taken to the plea, that the defendant did not shew any title to the market; but because there was no title in the plaintiff, and a possession in the defendant; that was held good until a better title was shewn, and therefore the plaintiff there was barred of his action; but *per Powell* justice, the case of *Wright v. Hardcastle* could not be law, for the difference is of a declaration against a wrong doer, there *possessionatus* is well enough, but in a plea in bar the defendant ought to shew his title; so in replevin the avowant ought to make title, and cannot say *seifitus fuit*, without shewing the estate, for it may be fee, tail, or for life; but in replevin the avowant may say that he was seised *de libero tenemento*, though that is against the common rules of pleading, yet because it is a form that has been constantly used, the courts allow it; but the courts will not admit this general way of pleading to be enlarged, and therefore (by him) this *seifitus*, without more saying, would be ill upon a general demurrer. But *per Treby* chief justice this pleading *seifitus* without more saying is but form, for no man can be said seised of a less estate than of a freehold; and therefore for the same reason that *liberum tenementum* is good in avowry, for the same reason *seifitus* is good.

Pleading of
seisin, and not
of what estate.

Wright v.
Hardcastle.
See 2 Mod. 70.
Searle v. Bu-
nion.

Owen 51.
Dier 171. b.

Mr. Northey for the avowant argued, that the avowry was good, because it is in nature of a declaration, and therefore it shall be admitted into the rules of declarations. In debt for rent the plaintiff

may declare, *quod cum ille demisit* to J. S. and the interest thereof came to the defendant, and it is good. Indeed if the plaintiff shews a title in the declaration, there it is reasonable that the defendant make a better title, to answer that of the plaintiff; but here the plaintiff makes no title but to the goods, and therefore the title need not to be so precisely shewn. And 1 Jones 453. gives the reason of the judgment in the case of *Scavage v. Hawkins*, because the land was not in demand, which will be an authority here, for no title is made to the place where, &c. And he cited a case in point between *Pashley* and *Seymour*, 2 Jac. 2. B. R. where in replevin the defendant avowed, that he was possessed of an inn called *The bull and mouth* for the term of 91 years to commence in the year 1666, and that in the year 1683 he demised it to *Kingdom* rendring rent, and for rent arear he avowed the taking of the plaintiff's goods being upon the premises, and judgment there was given for the avowant. But by the whole court in this case judgment was given for the plaintiff. For *per curiam* an avowry differs from a declaration; for in debt for rent, &c. one plea will answer the whole declaration, *viz. nil debet*, but in avowry no single plea will go to the whole, for the avowry must be traversed, but no traverse can be taken to the possession of the term. Besides, that it is an established rule, that the commencement of all particular estates ought to be shewn in pleas, avowries, &c. But where the action is brought upon privity of contract, there it is not material to shew the commencement. If a testator makes an under-lease rendring rent, and dies; the executor may bring an action, and say, that the testator was possessed, &c. and well. So the case of *Cro. Car. 571. Scavage v. Hawkins* was well enough. But *per Holt* chief justice it is a question, if the issue in the last case had brought an action against the assignee of the term, whether he ought not to have shewn the commencement of the estate tail. And *per Holt* chief justice the case in *Yelv. 147.* was a hard case, because the plaintiff in his replication had confessed and avoided the defendant's plea. And all the court denied the case of *Pashley v. Seymour* to be law. And judgment was entered for the plaintiff. Note, *Cartwright* said, that *Wright* chief justice, *Holloway* and *Allibon* justices in B. R. declared, when they gave judgment in the case of *Pashley v. Seymour*, that they did not understand pleading. And *Rokeby* justice made the same declaration in the resolution of this case. Note, A like judgment was given this term between *Challoner v. Clayton. Intr. Hil. 9 Will. 3. B. R. Rot. 408. See 10 Hen. 7, 8.*

Pashley v. Seymour,
2 Show. 484.

Avowry differs from a declaration.

Commencement of all particular estates ought to be shewn.

Comb. 476.

2 Vent. 182.

Carth. 30, 31.

So in avowry

by lessor a-

gainst his les-

see it is e-

nough to say,

that he was

possessed, &c.

Trevivan v.

Lawrence.

2 Vent. 181, 2.

Challoner v.

Cleyton,

3 Salk. 306.

Comb. 472.

Cromwell *vers.* Grumfsden.

THE plaintiff brought debt upon a bond against the defendant as executor to *Urkwin*, in which the plaintiff declared, that *Urkwin alias Urkwin* the defendant's testator bound himself to the plaintiff in the sum of 40 l. by bond (which he produces in court) *cujus datus est 1 Julii anno domini 1674, &c.* The defendant pleads, *quod non est factum* of the testator. And issue being joined thereupon, the jury find a special verdict; they find the bond in *haec verba*, which was, *noverint universi per praesentes nos Urlin et his wife teneri et firmiter obligari to Cromwell in prae Mid viginti in quadrans libris bonae et legalis monetae, &c. dat. 1 Julii anno regni Caroli secundi millesimo sexcentesimo septuagesimo quarto*; and the condition of this bond was for payment of 20 l. and that it was signed and sealed by the husband and wife, and subscribed by the name of *Urkwin*; *et si super totam materiam* the court should adjudge this the deed of the testator, they find that the defendant detains the debt; which was an ill conclusion, for the point in issue was, *factum* or *non*; but liberty was given to amend the conclusion without payment of costs after the special verdict had been argued at the bar. And after several arguments at the bar *Holt* chief justice this term delivered the opinion of the court, and said, that though this was a very insensible obligation, yet since the intent of the parties appeared plainly, that it should be a security for 20 l. by the penalty of 40 l. the judges were therefore unanimously of opinion, to give judgment for the plaintiff. And as to the first objection, that the testator was not bound in any sum certain, to that he answered, that as to the words [*in quadrans*] if they were alone, they would be insensible; but since they signify something of four, and the condition is for payment of 20 l. that shews that *quadrans* was put for *quadragesima*. And there are cases as strong; *quamquegenta* for *quingentis*, *Hob. 119. quantogint.* for *quingenta*, good. But he said, that he could not agree the case in *Hob. 19.* where *octogint.* is adjudged *octoginta*; for the *gent.* signifies always *centum*. And moreover the case there cannot be law, because costs are given to the defendant. And the words *prae mid viginti* are insensible, and therefore the sense being complete without them, they shall be rejected.

S. C. 5 Mod.

287.

Salk 462.

Bond, what

good?

Ro. Abr. 706.

Cro. J. 136.

Hob. 249.

Verdict ill
concluded.

See 2 Cro.

116.

Gregory v.

Wilkes.

2. It was argued in this case by the defendant's counsel, that the plaintiff by the *cujus datus* in his declaration has confined himself to the very date of which he has declared, because it is the very description of the bond; and therefore a bond of another date cannot

Bond with
none or an
impossible
date.

Possible date.

Delivery va-
ries from the
date.

Estoppel.

Recital.

cannot be intended to be the same bond with that upon which he declares, nor could the plaintiff give any such in evidence in this action by reason of the variance. And therefore it is the same thing, as if he had said *gerens datum*, which doubtless had been fatal. Where a bond has no date, or an impossible date, the plaintiff may declare that the defendant bound himself such a day, for the day is not material, but is only mentioned, because some time must be laid in the declaration. If a bond has a possible date, and a man declares of another date, it is ill, though he does not apply so particularly to the date of the bond, as by *cujus datus*, or *gerens datum*. If a man declares upon a bond dated 1 May, and in fact it was delivered 1 June following, it is ill; because upon a general declaration it shall be intended to be delivered upon the same day that it bears date, and therefore the declaration ought to have mentioned, that it was first delivered *primo Junii*. But if a bond bears date subsequent to the delivery, then a man cannot say in his declaration, that it was *primo deliberatum* such a day, because he is estopped by the bond to say, that it was delivered before it was dated. If a man declares upon a deed, *cujus datus est primo Maii*, and that it was *primo deliberatum primo Junii* after; he may give the bond in evidence, though delivered at another day; but *contra*, if it bears another date. If a man declares upon a bond made such a day, and upon *oyer* it bears date of a precedent date; yet it is well enough, because the declaration does not mention the date, but the making. But if a deed recites another deed, and misrecites the date of the former deed, it is fatal. But notwithstanding this objection *Holt* chief justice delivered the opinion of the court, that judgment ought to be for the plaintiff. For (by him) the date is an impossible date; and then the plaintiff might have averred it to be made when he pleased. And though by the *profert in curia* he has confined himself to a date, yet the *cujus datus* shall be intended of the delivery. But if it had been *gerens datum*, there could not have been room for such an intendment, and therefore it had been ill. But now it seems well enough, and is no more nonsensical than the case in *Yelv.* 193. And judgment was given for the plaintiff.

Thomee *vers.* Lloyd.

S. C. 1 Salk.

194.

Privilege
pleaded.

S. C. Comb.

482.

S. C. 12 Mod.

195.

6 Mod. 88.

P. 702.

I*Ndebitatus assumpsit.* The defendant *venit et dicit*, that he is an officer of the Exchequer, and pleads privilege. The plaintiff demurs. And exception was taken to the plea, because he pleads this privilege by writ, but not under seal of the court. *Sed non allocatur.* For *per Holt* chief justice, if a man pleads privilege, and at the time of pleading he produces a writ testifying that he is an

an officer, the plaintiff cannot deny the privilege. But if he pleads *See Post. 992.* it without a writ, the plaintiff may deny it, but the plea is good without shewing the writ. A second exception was, that it is not said, that the court ought not to have consance, in the beginning of the plea, but he says it in the end of the plea. *Sed non allocatur.* For *per curiam* the conclusion makes the plea. For if a man begins in bar, and concludes in abatement, it is a plea in abatement. *Rast. Entr. 178, 472, 3. Old book of Ent. 62. b. 128. Thomps. Entr. 3, 4.* And therefore judgment was given for the defendant. And afterwards in *Trinity* term motion was made, that the defendant should have costs upon the new act. But it was denied, because the plaintiff could not have had costs before final judgment, if the judgment had been given for him. *See Post. 992.* Plea to the jurisdiction. Conclusion makes the plea. *8 & 9 Will. 3. for preventing vexatious suits.*

Cox *vers.* Copping.

Ejectment for a house by the impropriator against the church-wardens of the parish of *Aldgate*. *Eyre* for the plaintiff moved, that he might have a rule to see the parish books, upon suggestion that they would make the title appear, and that they were common books belonging to all the parish; and that it did not differ from the cases, where a rule is granted, for the defendant to see court-rolls, and the books of a corporation. But denied *per curiam*. For where the parson claims a distinct interest from that of the parish, it is not reasonable, to compel the parish, to discover their title, by shewing the books, which are kept only for their own use. But the title of the copyholder depends upon the court-rolls. So of corporation books, which differ from the present case. *S. C. 5 Mod. 395.* Copy of parish books. *See, however, 3 Term Rep. 609.*

Rex *vers.* Morris.

A Quaker sued a *mandamus* directed to the mayor and burgeses of the city of *Lincoln* in the county of *Lincoln*, to command them to admit him *ad locum et officium* of a freeman of the said city, having served seven years apprenticeship. They return, that he refused to take the oaths of office. And the court after argument at the bar was of opinion, that he might take the solemn affirmation instead of the oaths by the act of 7 & 8 Will. 3. and that this freedom could not be taken within the words of the exception in the same act, *viz.* to be a place of profit in the government; though the return shews, that every freeman has a right to give a vote for electing members to serve in parliament, and to have common for certain cattle. But the *mandamus* was quashed, because it was to the mayor, &c. of the city of *Lincoln* in the county of *Lincoln*, whereas it should have been, in the county of *the* *Mandamus, how directed.*

the city of *Lincoln*. But *Holt* chief justice was of opinion, that the writ should have been, to admit him *ad privilegium* of a freeman, and not *locum et officium*.

S. C. Carth.

Atkinson. *vers.* Cornish.

446.

5 Mod. 395.

3 Danv. Ab.

356. p. 9.

S. C. Comb.

475.

1 Salk. 39, 29.

S. C. 12 Mod.

194.

12 Mod. 501.

Comyns 112,

159, 160.

Post. 667.

Ceasing of
administration
granted du-
rante minori-
tate.

Thomas v.

Freak, Salk.

39.

THE plaintiff brings an action as administrator to *J. S. durante minoritate* of *A. B.* and *C.* administrators of *J. S. cum testamento annexo*; and he avers, that *A.* is within the age of 21 years. The defendant pleads, that *A.* is of the full age of 21 years. The plaintiff tenders issue. And the defendant demurs. And it was objected, that judgment ought to be given for the defendant; for if *A.* be of 17 years, the administration granted during his minority ceases. And therefore the plaintiff could not have an action after. But *per Holt* chief justice, the difference is thus: If administration be granted *durante minoritate* of an executor, the administration ceases when the executor attains the age of 17 years; but if administration be granted *durante minoritate* of a man who is not executor, but only administrator, the administration does not cease until the administrator comes to the age of 21 years. And therefore in this case judgment for the plaintiff. Between *Thomas and Freak*, *P. 13 Will. 3. B. R.* it was adjudged accordingly, that the administration *durante minoritate* of an administrator does not cease until the administrator comes to the age of 21 years; where the plaintiff brought his action as administrator during the minority of an administrator, and averred, that he was under the age of 21 years, *viz.* of 18. And upon demurrer to the declaration, judgment for the plaintiff.

Bonner *vers.* Hall.

Intr. 9 Will. 3. B. R. Rot. 558.

S. C. Carth.

433.

Another ac-

tion depend-

ing.

Bisse v. Har-

court, 1 Salk.

177.

3 Mod. 281.

IN *indebitatus assumpsit* the defendant pleads another action depending in *curia nostra de C. B.* for the same cause; and he pleads this in abatement. The plaintiff replies, that there was not any action depending for the same cause; and therefore *petit judicium de debito et damnis*. The defendant demurs. The plaintiff joins, and concludes rightly. And it was admitted, that the plea was ill; because he pleads a cause depending in his court of *C. B.* and for other reasons. But then Mr. *Ward* moved, that there was a discontinuance; and for that he cited a case between *Bisse and Harcourt*, adjudged *Hil. 1 Will. 3. Mar. B. R.* where *indebitatus assumpsit* was brought for 400*l.* the defendant pleaded in abatement, that

that the plaintiff was convicted of felony; the plaintiff replied a pardon, *et petit judicium de debito et damnis*; the defendant demurred; and the plaintiff joined, and concluded rightly; and it was adjudged, that the plaintiff by his prayer of judgment of his debt and damages in his replication had discontinued the whole. But Mr. Broderick argued, that the demurrer would govern the case; and therefore since that concluded in abatement, it is good. And for that he cited *Moor* 692. *Quley v. Pontleroy*. Co. Entr. 158. *Dier* 227. 1 *Andersf.* 30. *Yel.* 5. 138. *Allen* 17. *Shalmer. v. Slingsby*. But per Holt chief justice, this case differs from the case of *Bisse v. Harcourt*, for there the plea was good; and then when the plaintiff replied new matter to maintain his writ, then he should have made his conclusion accordingly. But where the plaintiff traverses the defendant's plea in his replication, and offers an issue, he may pray judgment *de debito et damnis*, because if it be tried, peremptory judgment ought to be given. But in this case the first fault is in the defendant, for the plea is ill. And therefore judgment was given, *quod respondeat ulterius*.

show. 155.
Co. Entr. 160.
Rast. Entr.
663. b. 681.

Demurrer govern the case.

Discontinuance.

Conclusion to the replication after plea in abatement.

See 2 Vent. 179.

Fetter *vers.* Beal.

Special action of trespass and battery for a battery committed by the defendant upon the plaintiff, and breaking his skull. The plaintiff declares of the battery, &c. and that he brought an action for it against the defendant, and recovered 11 l. and no more; and that after that recovery part of his skull by reason of the said battery came out of his head, *per quod*, &c. The defendant pleaded the said recovery in bar. Upon which the plaintiff demurred. And Shower for the plaintiff argued, that this action differed from the nature of the former, and therefore would well lie, notwithstanding the recovery in the other; because the recovery in the former action was only for the bruise and battery, but here there is a maihem by the loss of the skull. As if a man brings an action against another for taking and detaining of goods for two months, and afterwards he brings another action for taking and detaining for two years; the recovery in the former action is not pleadable in bar of the second. If death ensues upon the battery of a servant, this will take away the action *per quod servitium amisit*. And then if a consequence will take away an action, for the same reason it will give an action. If a man brings an action for uncovering his house, by which his goods were spoiled, and afterwards by reason of the said uncovering new goods are spoiled, he shall have a new action. *Quod Holt negavit*. And *per totam curiam*, the jury in the former action considered the nature of the wound, and gave damages for all the damages that it had done to the plaintiff; and therefore a recovery in

S. C. 1 Salk. 11.

S. C. 12 Mod.

542.
Post. 692.

Recovery in one action, where a bar in another.

the city of *Lincoln*. But *Holt* chief justice was of opinion, that the writ should have been, to admit him *ad privilegium* of a free-man, and not *locum et officium*.

Atkinson. vers. Cornish.

S. C. Carth.
446.

5 Mod. 395.

3 Danv. Ab.

356. p. 9.

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475.

1 Salk. 39, 29.

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Comyns 112,

159, 160.

Post. 667.

Ceasing of

administration

granted du-

rantè minori-

tate.

Thomas v.

Freak, Salk.

39.

THE plaintiff brings an action as administrator to *J. S. durante minoritate* of *A. B. and C.* administrators of *J. S. cum testamento annexo*; and he avers, that *A.* is within the age of 21 years. The defendant pleads, that *A.* is of the full age of 21 years. The plaintiff tenders issue. And the defendant demurs. And it was objected, that judgment ought to be given for the defendant; for if *A.* be of 17 years, the administration granted during his minority ceases. And therefore the plaintiff could not have an action after. But *per Holt* chief justice, the difference is thus: If administration be granted *durante minoritate* of an executor, the administration ceases when the executor attains the age of 17 years; but if administration be granted *durante minoritate* of a man who is not executor, but only administrator, the administration does not cease until the administrator comes to the age of 21 years. And therefore in this case judgment for the plaintiff. Between *Thomas and Freak*, P. 13 Will. 3. B. R. it was adjudged accordingly, that the administration *durante minoritate* of an administrator does not cease until the administrator comes to the age of 21 years; where the plaintiff brought his action as administrator during the minority of an administrator, and averred, that he was under the age of 21 years, viz. of 18. And upon demurrer to the declaration, judgment for the plaintiff.

Bonner vers. Hall.

Intr. 9 Will. 3. B. R. Rot. 558.

S. C. Carth.

433.

Another ac-

tion depend-

ing.

Bisse v. Har-

court, 1 Salk:

177.

3 Mod. 281.

IN *indebitatus assumpsit* the defendant pleads another action depending in *curia nostra de C. B.* for the same cause; and he pleads this in abatement. The plaintiff replies, that there was not any action depending for the same cause; and therefore *petit judicium de debito et damnis*. The defendant demurs. The plaintiff joins, and concludes rightly. And it was admitted, that the plea was ill; because he pleads a cause depending in his court of *C. B.* and for other reasons. But then Mr. *Ward* moved, that there was a discontinuance; and for that he cited a case between *Bisse and Harcourt*, adjudged Hil. 1 Will. & Mar. B. R. where *indebitatus assumpsit* was brought for 400*l.* the defendant pleaded in abatement, that

that the plaintiff was convict of felony; the plaintiff replied a pardon, *et petit judicium de debito et damnis*; the defendant demurred; and the plaintiff joined, and concluded rightly; and it was adjudged, that the plaintiff by his prayer of judgment of his debt and damages in his replication had discontinued the whole. But Mr. Broderick argued, that the demurrer would govern the case; and therefore since that concluded in abatement, it is good. And for that he cited *Moor* 692. *Quley v. Pontleroy*. Co. Entr. 158. *Dier* 227. 1 *Andersf.* 30. *Yelo.* 5. 138. *Allen* 17. *Shalmer. v. Slingsby*. But per Holt chief justice, this case differs from the case of *Bisse v. Harcourt*, for there the plea was good; and then when the plaintiff replied new matter to maintain his writ, then he should have made his conclusion accordingly. But where the plaintiff traverses the defendant's plea in his replication, and offers an issue, he may pray judgment *de debito et damnis*, because if it be tried, peremptory judgment ought to be given. But in this case the first fault is in the defendant, for the plea is ill. And therefore judgment was given, *quod respondeat ulterius*.

show. 155.
Co. Entr. 160.
Rast. Entr.
663. b. 681.

Demurrer govern the case.

Discontinuance.

Conclusion to the replication after plea in abatement.
See 2 Vent. 179.

Fetter *vers.* Beal.

Special action of trespass and battery for a battery committed by the defendant upon the plaintiff, and breaking his skull. The plaintiff declares of the battery, &c. and that he brought an action for it against the defendant, and recovered 11 l. and no more; and that after that recovery part of his skull by reason of the said battery came out of his head, *per quod*, &c. The defendant pleaded the said recovery in bar. Upon which the plaintiff demurred. And Shower for the plaintiff argued, that this action differed from the nature of the former, and therefore would well lie, notwithstanding the recovery in the other; because the recovery in the former action was only for the bruise and battery, but here there is a maihem by the loss of the skull. As if a man brings an action against another for taking and detaining of goods for two months, and afterwards he brings another action for taking and detaining for two years; the recovery in the former action is not pleadable in bar of the second. If death ensues upon the battery of a servant, this will take away the action *per quod servitium amisit*. And then if a consequence will take away an action, for the same reason it will give an action. If a man brings an action for uncovering his house, by which his goods were spoiled, and afterwards by reason of the said uncovering new goods are spoiled, he shall have a new action. *Quod Holt negavit*. And per totam curiam, the jury in the former action considered the nature of the wound, and gave damages for all the damages that it had done to the plaintiff; and therefore a recovery in

S. C. 1 Salk. 11.

S. C. 12 Mod. 542.
Post. 692.

Recovery in one action, where a bar in another.

in the said action is good here. And it is the plaintiff's fault, for if he had not been so hasty, he might have been satisfied for this loss of the skull also. Judgment for the defendant, *nisi*, &c. *Post*.

Martin *vers.* Crompe.

Intr. Mich. 9 Will. 3. B. R. Rot. 475.

S. C. & Salk.

444.

Joint merchants, the one dies, the other shall have account against a factor without joining of the executor.

Co. Lit. 172, 182.

2 Lev. 188, 228.

Freem. 468.

3 Keb. 798.

Carth. 170,

171.

3 Lev. 290.

Kempe v.

Andrews,

Carth. 170.

IN account the case was thus: The plaintiff and *A.* being joint merchants, delivered goods to the defendant as their factor. *A.* died intestate, and administration of his goods, &c. was granted to *D.* The plaintiff brought account against the defendant without joining *D.* And the defendant pleaded this matter in abatement. The plaintiff demurred. Sir *Bartholomew Shower* argued for the plaintiff, that the plea was ill. For though amongst merchants the interest did not survive, yet the remedy would survive. For the books give account to the executor of the dead man against the surviving partner, which argues that the remedy in law is in the survivor. *Reg. 135. b. Fitz. nat. bre. 117. e. 3 Leon. 264.* If a man has a demand upon two joint traders, and one of them dies, he cannot sue the other and the executor of the deceased. It would then be difficult to enable the survivor and the executor to join. And no inconvenience will follow, if the survivor sue alone and recover, for he will be accountable to the executor. The law must be understood, that between themselves there is no survivorship; but that as to strangers it is otherwise. And he cited *Cro. Ja. 410.* as an apposite case; and a case between *Kempe* and *Andrews*, intr. Mich. 2 Will. & Mar. B. R. rot. 289. where a survivor merchant (who claimed a joint interest in a ship with another who was dead) brought an action against the defendant for detaining the ship, and the defendant pleaded this plea in bar, and judgment for the plaintiff. And it is consistent with the rules of law, that the one should have the interest, and the other the remedy. As the heir of the part of the father shall enter for a condition broken, and the heir of the part of the mother shall have the land. *Co. Li. 202. Northey e contra* for the defendant argued, that the plea was good, for tenants in common ought to join in personal actions; but between joint merchants there is no survivor, then the executor and the survivor are tenants in common, and ought to join. He agreed, that it is but a plea in abatement, and therefore distinguishable from the case of *Kempe v. Andrews*, where it was pleaded in bar. And the cases in the *Register* and *Fitzherbert's natura brevium* are for him; for if the right had survived, the executor of the dead trader could not have had account against the survivor. And 2 *Cro. 410.* is for the defendant; for the objection there is, if it had been brought for the whole

whole, they ought to have joined, and here it is brought for the whole. And he cited *Moor* 188. pl. 235. and 3 *Keb.* 737. intr. *Mich.* 28 *Car.* 2. *B. R. rot.* 546. as a case in point, and 3 *Keb.* 798. but his own report is, that the plaintiff had leave to discontinue. *Holt* chief justice, There is here a joint constituting of a bailiff, and therefore the contract will survive; and the bailiff shall have an action against the survivor for his wages. If the bailiff accounts, he shall deduct his charges out of the effects of both; but that which is clear upon the account stated, will belong to the administrator and the survivor, but the survivor shall take the whole, and allow a moiety to the administrator. It would make strange confusion, that the one should sue in his own right, and the other in another's right. And of that opinion the whole court seemed to be. But *quaere*, if any judgment was given? And *Holt* chief justice said in this case, that if there are two tenants in common of a reversion expectant upon a lease for years, upon which a rent is reserved, they may join in debt for the rent, or sever; and the one of them may have an action for the moiety of 20*l.* rent, but not for 10*l.* and so it has been adjudged. Afterwards judgment was given in this case according to the opinion aforesaid, and upon error brought in the Exchequer-chamber the said judgment was affirmed.

Astill vers. Clerk.

P. 10 Will. 3. C. B.

R Eplevin. The question was upon the pleading between the earl of Nottingham and the corporation of *Daventry*, whether the King can grant a fair within the duchy of *Lancaster*, and out of the county palatine, under the great seal of *England*? And after several arguments at the bar it was adjudged *Pasch.* 10 *Will.* 3. *C. B.* that he well might; because it is a new royal franchise of a new creation, and was not at any time an inheritance in the duke of *Lancaster*. *Moor* 167. the case of *Saffron Walden*. *Rast. entr.* 524. *quare impedit, trespass*, 635.

S. C. Lutw.
1233.
Ro. Abr. 182.
(*Db.*) p. 1.
Mo. 874.
Cro. J. 248.
3 *Salk.* 111.
Di. 232.
1 *Lev.* 28.
Grant of a
fair within
the duchy of
Lancaster.
See 37 *H.* 8.
cap. 16.
Keilw. 90. b.
1 *Inst.* 410.
Noy 53.

Rex vers. Salisbury. B. R.

I F a man prefers a scandalous petition to the house of lords, or makes an *affidavit* containing scandal against *J. S.* in *B. R.* a man cannot justify the publication of this, but it will be an offense indictable, because it tends to the breach of the peace. *Per Holt* chief justice. And such an indictment was denied to be quashed, upon a motion made for quashing it.

4 S

Term.

Term 10 Will. 3. C. B.

Contra formam statuti.

See Stat. 4
& 5 Ann for
amendment
of the law.

*Secundum leges
et statuta
regni.*

IN an action upon the case the plaintiff declared, that he distrained certain cocks of hay as a distress for arrears of rent, in order to sell them *secundum leges et statuta regni Angliae*; and that the defendant being conusant of the premises, rescued them, &c. Not guilty pleaded. Verdict for the plaintiff. Upon which the plaintiff prayed his triple damages upon the statute of 2 Will. & Mar. sess. 1. cap. 5. For though the plaintiff does not recite the statute, nor conclude *contra formam statuti*, yet it is well enough; because it is a general statute, and the distress is of such a thing as was not distrainable for rent at common law; and therefore *secundum leges et statuta* refers to this statute of Will. & Mar. *Sed non allocatur*. For *per curiam* the plaintiff does not bring himself within the compass of the statute; for he does not shew that the distress was appraised, nor conclude *contra formam statuti*. And then *secundum leges et statuta* is rather where a thing is proper by the common law, and confirmed by statute. And adjudged accordingly. *Ex relatione m^ri Daly.*

Jolliffe *vers.* Langston.

Attorney shall
have privilege
when he sues
a member of
a university.

AN attorney of the Common Pleas sued a member of the university of Oxford, who prayed his privilege, which is, not to be sued in another place. And *per Powell* justice, the general words of the statute will not extend to take away a privilege before *in esse*, but will extend to other persons. If the statute had not had any construction, unless it extended to persons who had privileges before; then it would take away their privilege. But here the statute may have another construction, and the words of the statute are not in the negative. See 3 Cro. Harris's case 180. And it is a reasonable construction to say, that the general words will take away the general liberty which every one hath to sue where he pleases; and not take away the special liberty that a man hath to sue in C. B. And adjudged accordingly. See Litt. Rep. 304. Mr. Daly.

Ward *vers.* Bendall.

Error upon the
principal judgment
will not
hinder the suing
of a *capias*
in order to
charge the
bail.

Post. 1259.

Cire facias against bail. The defendant pleads, that no *capias* issued against the principal. The plaintiff replies, that a writ of error was sued, and therefore he could not sue a *capias*, &c.

The defendant demurs. And *per Powell* justice, error upon the principal judgment is no bar to hinder the suing of a *capias*, in order to charge the bail. And it was so adjudged in this court very lately. Judgment for the defendant. Mr. Daly.

Birt qui tam, &c. *vers.* Rothwell. Ante 210.

THE court delivered their opinion, that judgment ought to be arrested for the misrecital of the statute against non-residence; for it was no offense at common law. Then there ought to be some statute to support the plaintiff's action. But there is no such statute as the plaintiff has shewn in his declaration. For though the statute of *Henry VIII.* is a general statute; yet the plaintiff has confined himself to the statute upon which he declares, by the words *contra formam statuti praedicti*; and therefore his declaration is vitious. The precedents are generally that this parliament was held at *Westminster*, but they do not say what day. *Co. entr.* 158, 203. *Rast.* 599. *Winch* 535. *Dugdale's summons to parl.* 496, 8. which is good authority. *Hollinshead* 909. Now the courts at *Westminster* ought to take notice of the beginning of all parliaments. The principal of the parliament is the King; and when he comes to meet the two houses, then the parliament begins. And this resembles the holding of other courts, *viz.* when the judges come, the court is said to begin to be held. The adjournment of the houses is the act of each house; but when the parliament is adjourned by the King, they call it a prorogation. Heretofore adjournments and prorogations were looked upon as the same thing, but the effects of them are very different at this day. Now this parliament was held at *London* the third of *November*, and adjourned to *Westminster*; and it was pleaded in that manner in the old precedents, but it was not well pleaded, for the adjournment should not be mentioned. And in probability it was only an adjournment to *Westminster*, so that the books are wrong that say adjourned and prorogued; for when a session of parliament is held after a prorogation, then they say, that it was held by prorogation such a day; but they never say held the day of the adjournment, but such a day of the sessions, without taking notice of the adjournment, which is a continued act. Now in this case the parliament being pleaded to be held *apud Westmonasterium tertio Novembris*, it is ill; for it was the third of *November* held at *London*; but if the plaintiff had omitted the words *tertio Novembris*, it had been well enough, for this parliament was held at *Westminster* after the third of *November*. See *Noy* 33. Judgment *quod querens nil capiat*, &c. Mr. Daly.

Trin.

Trin. Term

10 Will. 3. B. R. 1698.

Sir John Holt Chief Justice.

Sir Thomas Rokeby

Sir John Turton

Sir Samuel Eyre

} Justices.

Ellis vers. Ellis.

Intr. *Hil.* 9 *Will.* 3. B. R. Rot. 190.

S. C. 5 Mod.

368.

Infant.

S. C. Comb.

482.

1 Salk. 279.

1 Salk. 386.

12 Mod. 197.

10 Mod. 66.

1 Wms. 569.

THE plaintiff brought *indebitatus assumpsit* against the defendant, as executrix to Sir *John Ellis* her husband, for money lent to her husband in his life-time. The defendant pleads, that her testator was an infant at the time of the money lent. The plaintiff replies, that he lent 40*l.* part of the sum in demand to the testator to buy necessaries for himself, his wife, his children, and his family; and so they were expended. The defendant demurs. And it was argued for the defendant by Sir *Bartholomew Shower* and Mr. *Selby*, that the plaintiff has not avoided the plea of infancy in the testator. For, 1. If a man lends money to an infant, in order to buy necessaries, this will not charge the infant, but the debt must be for the very things themselves. 2. It is not sufficiently averred, that the necessaries were bought. 3. There is not any *venue*, where the 40*l.* were expended in the buying of necessaries. But *Northey* for the plaintiff confessed, if *A.* lends money to an infant to buy necessaries, and the infant does not lay out the money in buying necessaries, it will be at the peril of *A.* But here it is averred, that the 40*l.* were expended for him, his wife, children and family. And necessaries for his family will bind an infant. 1 *Sid.* 112. But to this the court gave no opinion; but for want of a *venue*, where the necessaries were bought, judgment was given for the defendant.

Venue.

IN

IN ejectment the defendant pleaded not guilty. And then, *relieta* Judgment *verificatione*, confessed the action. And the defendant's attorney confessed in subscribed the declaration accordingly. Upon which Mr. *Mulso* ter not guilty moved, that the court would permit the plaintiff to enter judgment pleaded. for himself. But *per curiam* the defendant's attorney ought to come in proper person before the master of the office, and do it there. And though it was urged, that the attorney could not come by any possibility; yet the motion was denied.

Sir Henry Bond's case.

SIR *Henry Bond* was outlawed for high treason, and was Cafes in B. R. brought to the bar in order to reverse his outlawry. And 198. error was assigned, that the exigent had not any addition. And up- Addition. on reading the record, it appeared, that the indictment had not any 2 Ro. Rep. addition. And therefore the question was, if the outlawry should 225. be reversed, whether Sir *Henry Bond* should be arraigned upon the 2 Inst. 670, indictment. And *Holt* chief justice thought he should not, because 595. the indictment appeared to be void. But afterwards at another Bro. Additions p. 50. day the reversal of the outlawry being pronounced for the error Arraignment. Sty. 294, 26. 1 Vent. 338. aforesaid, *Holt* chief justice told Sir *Henry Bond*, that he had li- Lat. 109. berty, either to take exception to the indictment for want of ad- 4 Leon. 121. dition, or to waive the exception, and plead his pardon; for with- 2 Hawk. P. C. out exception by the statute of *Hen. 5.* the indictment is not 190. cap. 23. void. And Sir *Henry Bond* waived the exception, and pleaded fec. 123. his pardon, as was done in the case of lord *Dover*. And the Comyns 257. court gave leave to Sir *Henry Bond* to stand, during the reading of his pardon.

Owen *vers.* Butler.

DEBT upon bond. Upon *oyer* the condition was, that the Comb. 483. defendant should pay three sums of money at three several Owen v. Bulk- days. The defendant pleads, that he hath paid the money due at ley. the two first days, and that the third day of payment is not yet That the day of payment is come. And this is pleaded in abatement. The plaintiff demurs. not come is no plea in abate- *Ward* for the defendant argued, that matter of bar may be pleaded ment. in abatement, 1 Mod. 214. as outlawry 24 Hen. 6. 1. Receipt of part of the debt pleaded in abatement. And it is not material, whether it be a plea in bar or abatement, because the plaintiff has confessed by his demurrer, that one day is not yet come. *Northey* for the plaintiff, the plaintiff by his demurrer confesses only that 4 T which

which is well pleaded, *Cro. Car.* 253. Money paid after the action brought ought to be pleaded in bar. *Holt* chief justice. If a man pleads in abatement, it ought to appear, that the plaintiff may have another action. *Ward*. That does not hold in case of the plea of outlawry. *Holt*. That is only in disability of the person. Judgment that he answer over.

Pullen *vers.* Purbecke.

S. C. 2 Salk.
563.
Carth. 453.
Hutt. 16.
Brownl. 38.
12 Mod. 361.
Poff. 718.
1 Sid. 91. p.
12.

THE plaintiff having recovered judgment against the defendant for , he sued an *elegit*, commanding the sheriff to deliver all the goods and chattels of the defendant, and the moiety of his lands, to the plaintiff. To which writ the sheriff returned, that he had delivered goods to the value of 60*l.* to the plaintiff; and that the inquisition found, that the plaintiff was seised of two farms, the one of 60*l.* *per annum*, and the other of 40*l.* and that he had extended the one farm of 60*l.* *per annum*, being an intire moiety. And now it was moved at bar, that the court would quash this *elegit*, and grant a new writ; because it appeared, that the sheriff had extended more than a moiety. And Mr. *Northey* said, that if the plaintiff comes in at the return of the *elegit*, and shews to the court, that there was partiality in the execution of the writ, the court will award a new writ, and entry shall be made, *quod vicecomes non misit breve*. *Townsh. Judgm.* 259. 3 *Keb.* 313. See 1 *Sid.* 21, 239. *Littelt. Rep.* 77. And *per Holt* chief justice, if a writ of *elegit* is awarded, and it appears to the court, that the sheriff hath not executed it; the court will award a new writ, and set aside the old writ. But *elegit* differs from a *fiery facias* as to goods, though it has been said, that an *elegit* as to goods is but a *fiery facias*. For upon *elegit* the sheriff may deliver the goods to the party, but not upon a *fiery facias*. If this motion had been made in the same term in which the return was filed, the court might have quashed it; but as there are seven years elapsed since, the court will not intermeddle.

New *elegit* awarded.
Elegit differs from *fiery facias* as to goods.

Cro. Jac. 246.

Cook *vers.* Licence.

Prohibition granted because the cause of action arises out of the jurisdiction of the court.

Motion was made for a prohibition, to be directed to the sheriffs court in *Bristol*, upon suggestion, that causes of action arising out of the jurisdiction of the sheriffs court ought not to be sued there. And this motion was made in behalf of the defendant in the action, before he had appeared, to stay the proceedings of the court, who proceeded to attach his goods in the hands of a garnishee. And Sir *Bartholomew Shower* opposed the motion,

motion, because the defendant cannot pray a prohibition upon suggestion of a matter which he could not plead. Now here he cannot plead this before appearance, and therefore he ought not to make such a motion before appearance. And *per Holt* chief justice, a man shall not plead to the jurisdiction, until he appear. But if the original cause of action arose out of the jurisdiction of the court, the garnishee may plead it, and of that opinion was *Hale* chief justice. But if it was debt upon a simple contract, it is attachable where the person of the debtor is. And *Showers* said, that in the case of *Clerk v. Andrews*, Pasch. 1 Will. 3 Mar. B. R. *Showers* moved for a prohibition to the court of the sheriffs of London, to stay proceedings, where they attached the debt of the garnishee, because it arose out of the jurisdiction; but it was denied, because the debt was upon simple contract, which follows the person of the debtor.

Prohibition ought to be prayed upon suggestion of a matter which may be pleaded.

Plea to the jurisdiction.

What garnishee may plead.

Foreign attachment.

Clerk v. Andrews, *Showers*, 9.

Hunt *versus* Lawton.

A Writ of error was brought to remove a record out of the Common Pleas of a *querela* between A. plaintiff and B. defendant, and the record certified was between A. plaintiff and B. *simul cum* D. E. &c. defendants. And it was moved, that this was not the same record; for a record between A. and B. cannot be the same as a record between A. and B. *simul cum* D. E. &c. But adjudged no variance, and the precedents are agreeable.

Variance.

Theobalds *versus* Long.

IF the defendant pleads another action depending for the same cause in the same court, the plaintiff may pray *oyer* of the record, being in the same court; and if there is no *oyer* of the record, the plaintiff may sign judgment by default. For in all cases where a deed or record is pleaded, and *oyer* prayed; if *oyer* is not granted, the plea is as no plea. *Keilw.* 95, 96.

S. C. Carth.

453, 517.

6 Mod. 122.

2 Keb. 275.

Oyer.

Judgment by default.

Rex *versus* Savage et al.

Savage and two others were indicted upon the 8 & 9 Will. 3. cap. 25. for licensing hawkers and pedlars, in as much as they sold glasses without licence. And it was moved, that the indictment should be quashed, because it does not lie for this offense; for it is an offense created by the said statute, which statute directs a forfeiture for it, and the remedy how it shall be recovered and bestowed;

Indictment where it lies.

bestowed; and therefore the offense is not punishable any other way not directed by the said statute. And the court seemed to be of that opinion. For by *Rokeby* justice, this act is designed to raise money by the licences of hawkers, &c. not to prohibit hawking as unlawful, for it is not prohibited, but only enacted that there shall be licences taken. But the court refused to quash it. *Ex relatione m'ri Place.*

Wilkins vers. Mitchel.

Mandamus
does not lie,
where there is
other remedy.
12 Mod. 196.
Raym. 214.
3 New Abr.
535.

THE plaintiff was nonsuit in the town court of Cambridge held before the mayor there, and the nonsuit entered and recorded. The defendant prayed to have judgment for his costs, but the mayor refused it. Upon which it was moved to this court, to have a *mandamus* to compel the said mayor, to give judgment for the defendant upon the nonsuit. But it was denied *per curiam*, for the defendant may have a writ *de executione judicii*, and a *mandamus* shall not be granted, where the party hath another remedy. *E. R. m'ri Place.*

But *nota* in the case of *The King v. Bishop of Ely*, it was said *per Lee* chief justice, that the law had been held contrary ever since *Easter term 11 Geo. 2.* Dr. Bentley's case.

Mich.

Mich. Term

10 Will. 3. B. R. 1698.

Sir John Holt Chief Justice.

Sir Thomas Rokeby } *Justices.*

Sir John Turton

Sir Samuel Eyre died the last vacation in the Northern circuit at Lancaster 10 Sep.

Matthews vers. Erbo.

MR. *Dee* moved to set aside an execution upon an outlawry against the defendant, upon *affidavit* that the defendant was an alien merchant, and lived beyond the sea, and was commorant there during all the time that the plaintiff proceeded to outlaw him. But it was denied by the whole court; because by this means any person may contract debts, and then go beyond sea, and so he will be out of the reach of the law. But the defendant may bring error, and reverse the outlawry, if he pleases.

S. C. Carth.
459.
Motion to set
aside outlawry
upon affidavit,
&c.

Pullein vers. Benson.

Intr. Trin. 10 Will. 3. B. R. Rot. 102:

Eborum ff. **M**emorandum quod alias scilicet termino Paschae ultimo praeterito coram domino rege apud Westmonasterium venit Thomas Pullein armiger nuper vicecomes comitatus praedicti per Carolum Sanderson attornatum suum et protulit in curia dicti domini regis tunc ibidem quandam billam suam versus Johannem Benson alias dictum Johannem Benson de eadem yeoman in custodia marrescalli,

S. C. 2 Salk.
628. 2
12 Mod. 205.
Debt upon
bail-bond.

marrescalli, &c. de placito debiti et sunt plegii de proseguendo scilicet Johannes Doe et Richardus Roe quae quidem billa sequitur in haec verba ff. Eborum ff. Thomas Pullein armiger nuper vicecomes comitatus praedicti queritur de Johanne Benson alias dictum Johannem Benson de eadem yeoman in custodia marrescalli marrescalliae domini regis coram ipso rege existente de placito quod reddat ei quadraginta libras legalis monetae Angliae quas ei debet et injuste detinet pro eo videlicet quod cum praedictus Johannes vicesimo die Novembris anno regni domini Wilhelmi tertii nunc regis Angliae, &c. nono apud Barnsley in comitatu praedicto per quoddam scriptum suum obligatorium sigillo ipsius Johannis sigillatum curiaeque dicti domini regis nunc hic ostensum cujus datus est eisdem die et anno cognovit se teneri et firmiter obligari eidem Thomae per nomen Thomae Pullein armigeri vicecomitis comitatus praedicti in praedictis quadraginta libris solvendis eidem Thomae cum inde requisitus esset Praedictus tamen Johannes licet saepius requisitus, &c. praedictas quadraginta libras eidem Thomae Pullein nondum solvit sed illas ei hucusque solve omnino contradixit et adhuc contradicit ad damnum ipsius Thomae Pullein decem librarum et inde producit sectam, &c.

Stat. 23 Hen.
6. pleaded.

Et modo ad hunc diem scilicet diem Veneris proxime post crastinum sanctae Trinitatis isto eodem termino usque quem diem praedictus Johannes habuit licentiam ad billam praedictam interloquendi et tunc ad respondendum, &c. coram domino rege apud Westmonasterium venit tam praedictus Thomas per attornatum suum praedictum quam praedictus Johannes per Willemum Manlove attornatum suum Et idem Johannes defendit vim et injuriam quando, &c. et petit auditum scripti praedicti et ei legitur, &c. petit etiam auditum conditionis ejusdem scripti et ei legitur in haec verba scilicet Condicio istius obligationis talis est quod si supra obligatus Wilhelmus Benson compareat coram domino rege apud Westmonasterium die lunae proxime post quindenam sancti Martini ad respondendum Johanni Brook generoso de placito transgressionis acetiam billae ipsius Johannis versus praefatum Willemum pro duodecim libris de debito quod tunc haec praesens obligatio vacua fuerit alioquin stabit et permanebit in suo pleno robore vigore et effectu Quibus lectis et auditis idem Johannes dicit quod ipse de debito praedicto virtute scripti praedicti onerari non debet quia dicit quod per quendam actum parlamenti domini Henrici nuper regis Angliae sexti apud Westmonasterium in comitatu Middlesex vicesimo quinto die Februarii anno regni sui vicesimo tertio tenti editum ex consideratione regis de magnis perjuriis extorsionibus et oppressionibus quae fuerunt et fuissent in hoc regno per ejus vicecomes subvicecomes et eorum clericos coronatores senescallos franchefiarum ballivos et custodes prisonarum ac alios officarios in diversis comitatibus hujus regni ordinatum existit et enactum fuit auctoritate ejusdem parlamenti inter alia quod dicti vicecomes et omnes

omnes alii officarii et ministri praedicti dimittent extra prisonam omnimodas personas per ipsos aut eorum aliquem arrestatas vel existentes in sua custodia virtute alicujus brevis seu warranti in actione personali aut per causam indictmenti de transgressionibus super rationabilem securitatem sufficientium personarum sufficiens habentium infra comitatus ubi tales personae sic forent dimissae ad baliolum sive manucaptionem Anglice to bail or mainprise ad custodiendum suos dies in talibus locis qualia dicta brevia billae vel WARRANTA requirerent (talibus persona seu personis quae fuerunt vel forent in sua custodia Anglice ward per condemnationem executionem capias utlagatum sive excommunicatum securitatem de pace ac omnibus talibus personis quae fuerunt vel forent commissae custodiae per speciale mandatum aliquorum justiciariorum et vagabundis renuentibus deservire secundum formam statuti de laboratoribus tantummodo exceptis) Et quod nullus vicecomes nec aliquis officarius seu minister praedictus caperet aut capi causaret seu faceret aliquam obligationem pro aliqua causa praedicta vel colore officii sui nisi tantummodo sibi metipsis de aliqua persona nec per aliquam personam quae foret in sua custodia per cursum legis nisi per nomen officii sui et sub conditione scripta quod dicti prisonarii comparerent ad diem in dicto brevi billa sive WARRANTO ac in talibus locis qualia dicta brevia billae seu WARRANTA requirerent Et si aliqui dictorum vicecomitum vel aliorum officiariorum sive ministrorum praedictorum caperent aliquam obligationem in alia forma colore officiorum suorum quod esset vacua prout per eundem actum inter alia plenius apparet Et idem Johannes ulterius dicit quod scriptum praedictum primo deliberatum fuit per ipsum Johannem tricesimo die Novembris anno nono supradicto quodque praedictus Willelmus Benson in conditione praedicta superius nominatus dicto tempore deliberationis et confectionis scripti illius apud Barnsley praedictam fuit in custodia praedicti Thomae ut vicecomitis praedicti comitatus Eborum existens per ipsum Thomam captus et arrestatus praetextu cujusdam brevis domini regis eidem vicecomiti directi et retornabilis coram domino rege apud Westmonasterium certo die termini sancti Michaelis tunc ultimo praeterito Ipsoque Willelmo Benson sic in custodia dicti Thomae ut praefertur existente ipse idem Thomas dicto tricesimo die Novembris anno nono supradicto et non antea scriptum obligatorium praedictum cum conditione praedicta colore officii sui vicecomitis comitatus praedicti de dicto Willelmo Benson ac de ipso Johanne ut ejus fidejussore contra formam statuti praedicti cepit videlicet apud Barnesley praedictam Et sic scriptum illud vigore statuti illius vacuum et nullus effectus in lege fuit et existit Et hoc paratus est verificare unde petit iudicium si ipse de debito praedicto virtute scripti praedicti onerari debeat, &c.

L. Agar.

Et

Demurter.

Et praedictus Thomas dicit quod ipse per aliqua per praedictum Johannem Benson superius placitando allegata ab actione sua praedicta inde versus ipsum Johannem habenda praeccludi non debet quia dicit quod placitum praedictum per ipsum Johannem modo et forma praedictis superius placitatum materiaque in eodem contenta minus sufficientia in lege existunt ad ipsum Thomam ab actione sua praedicta inde versus praefatum Johannem habenda praeccludendum ad quod ipse idem Thomas necesse non habet nec per legem terrae tenetur aliquo modo respondere Et hoc paratus est verificare Unde pro defectu sufficientis responsionis in hac parte ipse idem Thomas petit judicium et debitum suum praedictum una cum damnis suis occasione detentionis debiti illius sibi adjudicari Et pro causa morationis in lege super placito illo idem Thomas secundum formam statuti in hujusmodi casu nuper editi et provisi ostendit et curiae hic demonstrat has causas subsequentes videlicet quod placitum praedictum est incertum duplex et caret forma et non respondet narrationi ipsius Thomae praedictae.

E. Northey.

Et praedictus Johannes dicit quod placitum praedictum per ipsum Johannem modo et forma praedictis superius placitatum materiaque in eodem contenta bona et sufficientia in lege existunt ad ipsum Thomam ab actione sua praedicta inde versus praefatum Johannem habenda praeccludendum quod quidem placitum materiamque in eodem contentam ipse idem Johannes paratus est verificare et probare prout curia, &c. Et quia praedictus Thomas ad placitum illud non respondet nec illud hucusque aliquammodo dedit ipse idem Johannes ut prius petit judicium si ipse de debito praedicto virtute scripti praedicti onerari debeat, &c. Sed quia curia dicti domini regis nunc hic de judicio suo de et super praemissis reddendo nondam advisatur dies inde datus est partibus praedictis coram domino rege apud Westmonasterium usque diem proxime post de judicio suo de et super praemissis illis audiendo eo quod curia dicti domini regis nunc hic inde nondum, &c.

Bond taken by
a sheriff after
the return of
the *capias*.

c. 9.

The question in law intended by this plea was, if a sheriff arrest a man by virtue of a *capias*, &c. to him directed, and afterwards detain him in his custody until the return of the writ be expired, and then take bond of him, with condition that he shall appear in B. R. &c. at the day of the return of the writ which is there passed, whether this bond is made void by the statute of 23 Hen. 6. cap. 10. The words of which statute as to this purpose are; "And if any of the said sheriffs, or other officers or ministers aforesaid, take any obligation" (which is to be understood of obligations taken of those who are in ward of the sheriff, though the words are general, 10 Co. 100. *Beaufage's case*) "in other form (which words relate to the form prescribed by the former clause) "by colour of their

“ their offices, that it shall be void.” And it seems that such bond taken as aforesaid, is void by this statute. For, 1. the obligator was in ward of the sheriff. And though it may be objected, that he ought to be in a lawful ward, and this ward being after the return of the writ was false imprisonment, and therefore such bond might be avoided by duress of imprisonment; yet it may be answered, that for any thing that appears to the contrary, this was a lawful ward. For suppose the sheriff arrests a man upon a *latitat* or *capias*, and the prisoner does not find sufficient surety, the sheriff is not bound to let him go at large; then at the return of the writ the sheriff returns *cepi corpus*, and at the return has not the body in court; the sheriff is amerceable, but yet he ought to continue the prisoner in his custody; for if he suffer him to go at large, it would be an escape; so that the sheriff may be said to have a man lawfully in his ward after the return of the writ. 2. In 2 Leon. 107. by Fenner and Gawdy justices it is held, that it is not absolutely necessary that the obligor be in actual ward at the time of the bond made, to bring it within the compass of the 23 Hen. 6. cap. 10. for by them, if a man be in prison in execution, and makes a promise to make a bond to the sheriff, in consideration of which he is enlarged, and within an hour after he makes the bond; this bond is within the 23 Hen. 6. cap. 10. 3. He was once in this case lawfully in his custody; but in the case in *T. Jones* 76. earl of *Suffolk* against *Burkett*, it appeared, that the defendant was never in custody of the sheriff lawfully. 4. In 2 Sid. 129. *Jenkins v. Hatton*, the sheriff arrested a man by virtue of a writ returnable in the vacation, and took a bond conditioned for his appearance at the return of the writ; and in debt brought upon this bond it was adjudged, that the bond was void by the statute, but that the sheriff should not be amerced for the non-appearance of the defendant, nor liable to false imprisonment. [But note, there was no default in the sheriff.] 2. This bond is taken in another form than the statute prescribes; for the statute prescribes a bond with condition, &c. but this bond is single, for a bond made with a condition that is impossible to be performed at the time of the making of the bond is single, and a single bond is void by the statute. 10 Co. 100. 3. This bond was taken by the sheriff *colore officii*, for it was made to him *quatenus* sheriff, to let the obligor go at large. 4. In 2 Keb. 108, 109, 122. 1 Sid. 300. *Courtney v. Phelps*, such a bond is admitted by the court to be within the statute. But *quaere* of that; for though I was prepared to have offered this matter aforesaid in behalf of the defendant in this case, yet exceptions were taken to the form of the plea, so that the matter of law did not come in question. And Mr. *Northey* told me, he was of opinion, that such a bond was not within the statute 23 Hen. 6. cap. 10. And note, that the objection, that the obligor was not in lawful

Winch 20,
Epsom v.
Bathurst.

Intr. Hil. 28
& 29 Car. 2.
rot. 1207.
B. R.

See 1 Keb.
554.
1 Sid. 151.
Brumfield v.
Penhay.

ward of the sheriff at the time of the bond made, is very material; for doubtless the detaining after the return of the writ was false imprisonment in the sheriff. And though perhaps the sheriff in some particular case may justify a detainer in custody after the return of the writ, as in the case put before, yet no such thing appearing in the plea, it must be taken most strongly against the pleader.

The court will take notice of the beginning and end of the fixed terms.

2. It seems the court would have taken notice, that this bond was made after the return of the writ; for it was made the thirtieth of *November*, and the writ was returnable *die lunae proxime post quindenam sancti Martini* in *Michaelmas* term; and the court will take notice, that the thirtieth of *November* is always after the end of *Michaelmas* term; for they will take notice of the beginning and end of the fixed terms, if they will not of the moveable terms. See for this, 1 *Sid.* 308. *Champion v. Skipwith.* 1 *Ventr.* 264. 3 *Keb.* 385. *Kelfy v. Green.* *Cro. Car.* 53. *Latch* 11, 118. 1 *Roll. Abr.* 525. *Griffin v. Bedle.* 1 *Sid.* 300. 2 *Keb.* 108, 109, 122. *Courtney v. Phelps.* *Ante* 4. But this matter was not drawn in question, no more than the former.

But Mr. *Northey* for the plaintiff took exceptions to the plea. 1. That the plaintiff has declared upon a bond bearing date the twentieth of *November*, which shall be intended to be delivered at the same time, and to be then a perfect and complete deed. Then when the defendant comes and says, that the bond was *primo deliberat.* the thirtieth, he ought to have traversed, that it was delivered the twentieth, or at any time before the thirtieth of *November*. And for want of such traverse the plea is ill, for no answer is given to the deed upon which the plaintiff declares. And for authority in point he cited *Yelv.* 138. 1 *Brownl.* 104. *Green v. Eden.* 2 *Cro.* 263. *Osbey v. Sir Baptist Hicks.*

Against which it was argued by myself, that the defendant had no need to traverse the delivery supposed by the plaintiff in his declaration. 1. Because it is a rule, that when the defendant confesses and avoids the matter charged by the plaintiff in his declaration, he has no need to traverse it. And farther, if in such case he takes a traverse, it will vitiate his plea. Then to prove, when the defendant pleads *primo deliberat.* &c. of a deed at another day than is supposed by the plaintiff in his declaration, that this *primo deliberat.* has confessed the very deed upon which the plaintiff declares, I cited *W. Jones* 66. the bishop of *Norwich* against *Cornwallis*, where debt was brought upon a bond dated the thirtieth of *November*, conditioned to perform an award to be made before the first of *June* next following, the defendant pleads, that he caused this bond to be written the thirtieth of *November*, but that he afterwards

terwards delivered it as his deed the twenty-eighth of *April*, and that no award was made between the twenty-eighth of *April* and the first of *June*, *absque hoc quod ille per praedictum scriptum obligatorium cognovit se teneri* to the plaintiff, as he has declared; and upon special demurrer adjudged for the plaintiff. And in 2 *Keb.* 108. the judges gave the reason of the said judgment, *viz.* because the traverse was repugnant; for he had confessed the bond, upon which the plaintiff had declared, by his plea of *primo deliberat.* for if he had not confessed it, the traverse had not been repugnant. Then if the *primo deliberat.* confesses the same bond, it sufficiently avoids it; and therefore there is no need of a traverse. See *Yelv.* 31. *Gibson v. Holcraft.*

2. It is a rule, that a man shall never traverse the bare supposal of a writ or declaration. 1 *Edw.* 4. 9. 5 *Hen.* 7. 13. 6 *Hen.* 7. 6. 1 *Leon.* 79. Now here it is only supposed, that the bond was delivered the twentieth. But if it had been expressly averred, that the deed was delivered the twentieth, the defendant, if he had pleaded as here, ought to have traversed. 18 *Hen.* 6. 8. *Fitzb.* W. Jones 66. *bar.* 131. 8 *Hen.* 6. 6. *b.* Therefore in this case I cited 5 *Hen.* Latch 59. 7. 26. as an authority in point *per Brian* and *Townsend*, who were 12 *Mod.* 204, the judges there; where the case was thus: *A.* brings *quare impedit* against *B.* and declares that *C.* was seised of the advowson in 205. fee, and presented *J. S.* his clerk, &c. and afterwards by his deed 3 *Salk.* 352. bearing date the first of *May*, &c. granted the next avoidance to *A.* *per the name* *J. S.* died, and *B.* hinders *A.* from presenting; *B.* says, that well of Buller and Benson. and true it is, that *C.* granted to *A.* the next avoidance by his deed bearing date the first of *May*, &c. but that it was delivered to him the fourth day, and before the fourth day *C.* granted to *B.* by his deed which here is, &c. and adjudged that the plea was good without taking a traverse. And there the distinction is taken, where the delivery is expressly alleged in the declaration, and where it is only supposed or intended. See also 2 *Keb.* 108. *Courtney v. Phelps*, by the opinion of the judges there is no need of a traverse. But note *Siderfin* 301, who reports the same case, is *contra.* See *Noy* 43. And afterwards *Wright* King's serjeant at another day argued to the same purpose; and also, that if a man traverses matter not alleged, it will vitiate the plea. And he insisted upon the difference between matter taken by supposal, and matter expressly alleged. And he argued, that where a deed is produced, the law intends and supposes that the grantor was of capacity; yet if debt be brought upon a bond, and the defendant pleads infancy, he shall never traverse that he was of full age. The same law of coverture. Yet in both the cases the law intends *prima facie* that the grantor was of capacity to grant or bind himself. And he relied strongly upon 5 *H.* 7. 26. which case he said was not distinguishable from the case in question.

Sed

Traverse of
the date of a
bond.

Brook *estran-*
ger al fait ou
record.

Stranger.

Traverse.

Mich. 4 Edw.
3. 43. pl. 22.

Sed non allocatur. For per Holt chief justice there is here an averment by implication at least, that this bond was delivered the twentieth of November; for the date of a bond is the delivery of the bond, and shall be always taken so, if the plaintiff does not shew the contrary in his declaration. And then if the defendant varies from it in his plea, he ought to take a traverse, if the time of the delivery be material. *Yelv. 138. Green v. Eden* is a case in point. But the case of *5 Hen. 7. 26.* is good law, but distinguishable from this case; for there the defendant who pleads is a stranger to the deed shewn by the plaintiff, and therefore he is not bound to answer to the circumstances of the deed, but only the priority of the grant. A stranger to the deed may plead *non concessit*, and not *non est factum*. *Contra* of him who is party to the deed. A stranger to a deed may aver delivery of the deed before the date; but a party cannot. But in this case the defendant is party to the deed. And as to the objection, that if a man pleads infancy in debt upon bond, he shall never traverse, that he was of full age; he answered, that though the plaintiff has expressly averred, that the defendant was of full age when he delivered the bond, yet the defendant may plead infancy, and shall not traverse that he was of full age; because it was alleged out of time, and a man shall never traverse matter alleged out of time. 2. It seemed to the court, that there was here an express averment, that the bond was delivered the twentieth of November; for the words of the declaration are, that the defendant *vicefimo Novembris, &c. per quoddam scriptum suum obligatorium sigillo* of the defendant *sigillatum cujus datus est eisdem die et anno cognovit se teneri et obligari* to the plaintiff, &c. so it is averred, that the defendant acknowledged himself to be bound to the plaintiff the twentieth of November, which could not be if the deed was not then delivered.

What shall be
said a traverse.

But then it was argued by the defendant's counsel; that there was a traverse; for (by them) the essential part of a traverse is but the denial of a material matter alleged by the plaintiff or defendant respectively, the formal part is *absque hoc*; but that a traverse is good without the words *absque hoc*, is expressly resolved in *Saund. 22. Bennet v. Filkins*. Then here is an averment, that the bond was delivered the thirtieth of November and not before; which is as express a denial, as if the defendant had said, that the bond was first delivered the thirtieth of November, *absque hoc* that it was delivered the twentieth of November, or at any other time before the thirtieth. But as to this the chief justice said, that *non antea* would be a traverse in some cases*, but not here. 2. There is here a reason he gave was, that in this case one cannot conclude to the country, because there ought to be other matter alleged to make the date material; otherwise where that is the single matter of the plea.

*Mr. Jacob
said, that the
reason he gave
ter alleged to

special

special demurrer, and *caret forma* shewn for cause. And Rokeby justice said, that if a man shews any thing for cause of demurrer upon record, he may aver other matters *ore tenus*. Special demurrers.

Another exception to the plea was, that the defendant has not shewn the writ, by which the sheriff arrested *William Benson*, at large. But to that it was answered, that the defendant is a stranger to the arrest, and therefore cannot know at whose suit the writ issued, but the plaintiff himself has it in his custody, and therefore it is well enough. 1 Saund. 14. But to this point the court gave no opinion. A stranger is not to shew the writ at large.

Another exception was, that the plea is double, for the defendant pleads the statute, and also has pleaded matter to avoid it at common law; for he says, that the sheriff took the bond of *William Benson* *adtunc et ibidem capto et arrestato*, which appears to be after the return of the writ, and therefore false imprisonment, and so avoidable by duress. But to this it was answered, that it is one intire plea, and intirely upon the statute; for a man cannot avoid a bond by duress of imprisonment of a stranger, and he is a stranger who was imprisoned. But to this point the court gave no opinion. Then I took exception to the declaration, that it is said, that the defendant bound himself to the plaintiff *per nomen Thomae Pullein vicecomitis comitatus praedicti*, and it does not say, of what county he was sheriff; and the *per nomen* is to be taken to be the specifick words of the bond; and so it is not taken by the name of office, as the statute requires. But the court did not regard this objection, because it appears upon the whole declaration, that he was sheriff of *Yorkshire*; and if there was such omission in the bond, upon the oyer the bond ought to have been entered at large, and then advantage might have been taken of it, but not now. Judgment for the plaintiff by the whole court for want of the traverse. Double plea.
Durefs.
When advantage may be taken of a bond not taken in the name of office of the sheriff.
See 1 Saund. 21.
2 Keb. 620.
2 Roll. R. 365.
Palm. 371.
Neel v. Cooper.
3 Cro. 800.
Guybon v. Whitetost.

Waters *vers.* Glassop.

THE plaintiff declares, that the defendant's son was indebted to him in , and that he had a design to arrest him for it; that the defendant, in consideration that the plaintiff at the special instance and request of the defendant would forbear to arrest the defendant's son until after the twenty-third of *October*, the defendant assumed to pay to the plaintiff on or before the twenty-third of *October* so much as the defendant's son should be indebted to the plaintiff upon the balance of the account to be stated between the defendant's son and the plaintiff; and the plaintiff

Consideration in *assumpsit*.
1 Mod. 71.
1 Sid. 396.
1 Vent. 9, 153.
2 Keb. 401,
443, 453.
1 Saund. 210.

See 1 Roll.
Ab. 15. pl. 6.
Rowlandson v.
Simpson.

Intendment.

tiff averred, that an account was stated of all debts owing by the defendant's son to the plaintiff, and upon that account the defendant's son was found indebted to the plaintiff in 20*l.* and avers, that he forbore to arrest the defendant's son from the time of the promise *bucusque*; and that the defendant did not pay the 20*l.* &c. Upon *non assumpsit* pleaded, verdict for the plaintiff. And *Ward* moved in arrest of judgment, that the consideration was not good; because since the plaintiff was to forbear until after the twenty-third of *October*, and the defendant to pay the money on or before, it might be, that after the defendant had paid the money, the plaintiff would not perform his part, but arrest the defendant's son before the time agreed by the promise. *Sed non allocatur.* For *per curiam* the consideration is well enough, for the defendant has to the last instant of the twenty-third of *October* to pay the money, and the next instant for forbearance the plaintiff has performed his part, for he is not bound to forbear but only one instant after the twenty-third of *October*, and therefore it is well enough. A second exception was, that the defendant assumed to pay all that should appear to be due by the defendant's son to the plaintiff upon the balance of the account to be stated between them, which is to be intended of all debts due as well of the one side as of the other, and there is here an averment only, that an account was made of all debts due by the defendant's son to the plaintiff, but perhaps if an account had been stated of all debts due on both sides, the plaintiff might have been found debtor to the defendant's son, and not *vice versa*; and therefore the defendant assumed to pay only what should be due upon such account; and therefore for want of shewing, that such an account was stated, the plaintiff has not intituled himself to his action against the defendant. *Sed non allocatur.* For *per curiam*, they will not intend after a verdict, that any thing was due from the plaintiff to the defendant's son. And judgment for the plaintiff.

Hill *vers.* Vaux.

S. C. 2 Salk.
656.
Carth. 461.
12 Mod. 206.
Bunb. 73.
Modus for
tithes of milk.

MOtion was made, that the King's Bench would grant a prohibition to the Spiritual Court, where the defendant *Vaux* libelled against the plaintiff for tithes of milk. And it was grounded upon a suggestion of a custom, that every inhabitant in the parish, who kept cows there, had used time whereof, &c. to set out the whole meal of milk upon the ninth day of *May* at night, and upon the tenth day of *May* in the morning, *et sic super quemlibet nonum diem tunc proxime sequentem*, until one lamb yeaned in the next year following should be heard to bleat there; and the milk set out in such manner the vicar for the time being had used to send

send a servant to bring to him; and that was in satisfaction of all tithes of milk. And a rule was made, that a prohibition should be granted, *nisi causa, &c.* Upon which *Wright* King's serjeant at the day appointed argued, that the rule ought to be discharged; because unreasonable customs are void. *Hob. 175. Topsall v. Fer-* Unreasonable
rers 329. Barker v. Cocker. Then this custom is unreasonable, customs.
because it forces the parson to send for the milk where it is milked; and then if it be a great parish, he must keep more servants than his vicarage will sustain. And in *Raym. 277. Dodd v. Ingleton* it is held, that tithe milk ought to be brought to the parson's house. And of this opinion was *Rokeby* justice. But *Holt* chief justice *contra.* For (by him) if a parishioner sets forth a custom, Tithe milk,
to pay the tithes to the parson at his house, though he prescribes where pay-
to pay them in kind; this will be a good custom. And for that able?
he cited the opinion of *Popham* chief justice, 3 *Cro. 609. Austin v. Lucas*, where he says, that a prescription, to pay to the parson the tenth quart of milk at the parson's house, would be a good *modus*. And *per Holt*, the resolution in *Raym. 277.* is an equitable resolution, founded upon the usage of the neighbouring parishes. See *Palm. 341, 381. Wiseman v. Denham.*

2. *Wright* King's serjeant argued, that this custom is a plain prescription *in non decimando* for a great part of the year. For the prescription is in truth to pay less in the compass of the whole year than a tenth part. And then no custom is good to pay the same thing in kind, unless it be to be paid in a more beneficial manner, than that which the law prescribes. 3 *Cro. 609. 2 Cro. 47. 1 Mod. 229. Moor v. Field. 1 Andersf. 199.* But where Diversity.
there is some alteration in the payment of that which the law appoints for the advantage of the parson, though the advantage be small, yet the custom shall be good. *Hob. 250.*

But against this *Coniers* King's counsel argued, that the custom was good. For (by him) the usual time for ceasing from this payment in this parish is the middle of *March*; for being in *Lincolnshire*, there are no lambs yeaned before that time. Then for the days in which the parson is deprived of the tithe which the law gives him, he receives very great recompence, in receiving the whole meal of milk every ninth day, when the cows give more milk than they do in *March* and *April*. And he cited the case of *Lee v. Collins, 1 Roll. Abr. 648. C. 3.* where it is said, that it is a good *modus* for tithes of eggs, to pay in *Lent* thirty eggs for all tithes of eggs. *Sed non allocatur.* For (*per totam curiam*) the custom is ill, and it is a plain *non decimando*. For suppose a lamb Non deci-
bleats there at the end of *December*, or at the beginning of *Janua-* mando.
ry, the parson shall lose tithes for four months and more. Then
a man

Thirty eggs
for tithes of
eggs of his
own hens, ill.

a man cannot prescribe to pay less of the same thing; but ought to prescribe, to pay some other thing in lieu of it, or to pay it in some other manner than the law prescribes. And *per Holt* chief justice, this does not resemble the case of the thirty eggs in *Lent*, for there the custom binds the parishioner to the payment of so many at that time; and whether he have hens or not, he is obliged to it; so that he may be obliged to buy eggs, to pay the parson; and that makes it a good custom. But if the custom was that he should pay thirty eggs of his own hens, the custom would be ill. The rule for the prohibition was discharged.

Hawkins *vers.* Cardy.

S. C. 1 Salk.
65.
Carth. 466.
S. C. 12 Mod.
213.
3 Bullst. 232.
Bro. Cases 9.
pl. 52.

Apportion-
ment.

THE plaintiff brought an action upon the case upon a bill of exchange against the defendant, and declared upon the custom of merchants, which he shewed to be thus; that if any merchant subscribes a bill, by which he promises to pay a sum of money to another man or his order, and afterwards the person to whom the bill was made payable indorses the said bill, for the payment of the whole sum therein contained, or any part thereof, to another man, the first drawer is obliged to pay the sum so indorsed to the person to whom it is indorsed payable; and then the plaintiff shews, that the defendant *Cardy*, being a merchant, subscribed a bill of 46 l. 19 s. payable to *Blackman* or his order; that *Blackman* indorsed 43 l. 4 s. of it payable to the plaintiff, &c. The defendant pleaded an insufficient plea. The plaintiff demurred, and the defendant joined in demurrer. And adjudged *per totam curiam*, that the declaration is ill. For a man cannot apportion such personal contract, for he cannot make a man liable to two actions, where by the contract he is liable but to one. As if *A.* grants a rent charge of 20 l. *per annum* to *B.* *B.* grants 10 l. to *C.* *C.* cannot compel the terretenant to attorn. So if lands are conveyed with warranty to *A.* and *B.* their heirs and assigns, if partition be made, the warranty is extinct. See *Hob. 25. Roll.* and *Osborne's* case. But if in the principal case the plaintiff had acknowledged the receipt of the 3 l. 15 s. the declaration had been good. And though it was objected by Mr. *Northey* for the plaintiff, that the plaintiff has made payment of a part to be part of the custom, and therefore it was well enough by the custom. *Holt* chief justice answered, that this is not a particular local custom, but the common custom of merchants, of which the law takes notice; and therefore the court cannot take the custom to be so. And the whole court were of opinion, that judgment ought to be entred for the defendant. But upon the importunity of Mr. *Northey* leave was given to the plaintiff, to discontinue upon payment of costs.

Rex

Rex *vers.* Sir Richard Raines.

A *Mandamus* was directed to Sir Richard Raines, to command s. c. 1 Salk. 299. him to grant probate of the will of *Editb Pinfold* to one *Richard Watts*, who was made executor of it. Sir Richard Raines Carth. 457. makes return to it, and admits, that *Editb Pinfold* made her will, *Mandamus to* and *Watts* executor of it; but says farther, *quod luculenter et judicialiter fuit probatum, et constat* to him, that *Watts* is worth compul the ordinary to grant administration. nothing, but absconds for debt; and therefore that it is lawful to 3 Williams 337. him, to defer the granting of the probate, until *Watts* find sufficient security to perform the intent of the will. And it was argued by Sir Bartholomew Shower, Mr. Montague, and Dr. Waller the King's advocate general a civilian, that this return was good, and that a peremptory *mandamus* ought not to be granted. And Dr. Waller said, that in fact the case was thus; *Editb Pinfold* made her will, and *Richard Watts* her nephew her executor, and devised to him 100*l.* for a legacy, and some cattle; she devised also to *Baines* her brother 500*l.* and the residue of her personal estate to the son of *Baines*; the will was brought by *Baines* to the prerogative court to be proved; and it was opposed by *Huntley*, but was not promoted at all by *Watts*; sentence passed in the prerogative court for *Baines*; upon which *Huntley* appealed to the delegates, and the sentence there was confirmed; whereupon the will was returned into the prerogative court, and then *Watts* claimed probate; but upon examination it appeared to the judge, that he was an insolvent and necessitous man, and had received his legacy, and therefore the judge required caution; upon which *Watts* obtained this *mandamus*, and to it the judge made this return, which (by Dr. Waller) is good. For 1. if there is any default in the judge in the administration of his office, it is a proper subject for an appeal; for this will, being of chattels, is altogether of ecclesiastical consuance; and therefore as the spiritual judge shall judge of the validity of the will, so he ought to make a judgment, whether he ought to grant probate of it or administration, or if the executorship be conditional, as it may be, whether the condition be performed, &c. in all which cases if he makes a false judgment, the proper remedy is appeal, and not to come in this manner for remedy to the King's Bench.

2. He argued, that the judge has done nothing, but what in such cases he ought to do; for in such cases he may properly require caution. In the time of the heathen emperors the testaments were reposed in the colleges of the *pontifices*, and from the first

Christianity of the Roman emperors the bishops were intrusted with them. Now the civil law was, that security should not be demanded *de baerede*, which at that time included what we now call executor, unless he was insolvent; and then it was lawful to demand caution or security. But after this the canon law followed, and then they made use of the word executor which was before included in the word heir; and of them there are three sorts.

Sorts of executors.

1. *Legitimus*, viz. the ordinary. 2. *Datus*, viz. he whom the ordinary appoints, and he always gives security. 3. *Testamentarius*, who came instead of the heir, which is he whom we call executor καὶ ἐξοχὴν. And then as the heir before, if he was insolvent, always gives caution; so for the same reason an insolvent executor always gives caution. To say the truth, there is a difference made, when the testator knew at the time of the making his will, that the person, whom he constituted executor, was then insolvent, and when the executor is become insolvent by matter *ex post facto*; but at what time *Watts* became insolvent, does not appear in this case; and therefore to justify the acting of a judge, the court will intend, if it be material, that he became insolvent since the death of the testatrix, rather than at the time of the will made, *Linw. provinc. lib. 3, 23. tit. de testamentis*, it is said, that no religious man shall be executor, unless his superior takes care to give caution for the due execution of the will, and for the loss that may happen by his administration; and *Linwood* gives the reason of it, because it appears that such a person is insolvent; which proves that insolvent persons ought to give caution. So *Linw. cap. statut.* before the executor be admitted by the ordinary to execute the will, he ought to take an oath, &c. (which is the constant practice, and yet no mention is found of such oath, before that which these constitutions in *Linwood* make of it; and yet before the new statute if quakers refused to take such oath, no probate of any will used to be granted to them,) *et si oporteat*, says *Linwood*, he shall give sufficient caution. To the same purpose *Swinb. 6 part, par. 14. pag. 363, 364.* To which Sir *Bartholomew Shower* added, that if an executor is *non compos*, the ordinary is not bound to grant probate to him, because he hath an apparent disability to execute the will, which strongly resembles this present case. 2. He said, that if the executor refuses to take the oath, this amounts to a refusal of the office, and the ordinary may grant administration *cum testamento annexo*. Why then shall not the refusal to give security amount to a refusal of the office of executor; since there is no positive law, that in such case the ordinary shall administer an oath, more than in this case that he shall demand caution? 3. He said, that *mandamus's* are granted oftentimes, to compel the granting of administration; and rightly, because they seem to be founded

Executor non compos.

founded upon the act of parliament, which appoints the granting of administrations; but one cannot find any precedents of *mandamus*, to compel the judges of the civil law, to execute their law, which seems to be the present case.

But against this it was argued by Mr. Northey and Mr. Eyre, that a peremptory *mandamus* ought to be granted. For (by them) the return is not sufficient, because it is, *quod constat*, &c. which is no positive averment. *Raym.* 153. 2. They argued, that the prerogative court cannot in such case require caution, for the same reasons that the court afterwards gave for the ground of their judgment, and therefore unnecessary to be repeated.

See Stile 455.
Davis v.
Matthews.

Per Holt chief justice. Wills and testaments are of ecclesiastical conu-
fance, not by force of the civil or canon laws (for they bind no farther here, than as they have been received here) but by the law of the land. Then if the ecclesiastical courts proceed to enlarge the power of the judge, contrary to that which the common law allows, the King's Bench will prevent all sorts of encroachments. As if an executor be sued in the ecclesiastical courts to make distribution, he not being residuary legatee; though that were allowed by the canon law, yet the King's Bench would grant a prohibition to stay any such suit; for all suits for distributions were prohibited by the King's Bench, until the 22 & 23 *Car.* 2. *cap.* 10. made them lawful. Dr. Waller has not quoted any canon law, that the ordinary in such case ought to take caution; and the common law will not permit him, to exact security, for the insolvency of the executor. For suppose in this case (as the fact is) the executor will not give security, and yet will not renounce the executorship; the ordinary cannot compel him to give security. What must be done? Though the refusal of the oath amounts to a refusal of the office of executor (because the oath is allowed by the common law, for it is proper to take a promissory oath, that he will execute the office justly, which he is going to execute) yet the refusal to give security will not amount to a refusal of the office of executor; because it is against common right, to require collateral security. Then the testament will continue in force, the ordinary cannot grant administration *cum testamento annexo*, and so there will be a failure of justice, no body being capable to sue the testator's creditors. One half of what one finds in *Linwood* is not the law of the land. And as to the case of religious persons, objected out of *Linwood*, he said, that if a monk be made an executor, he cannot accept the office without leave of his superior; and then if the superior gives him leave to be executor, without giving other collateral security, the superior by his leave given is become security; and if the monk commits a *devastavit*, the suit shall

Wills of eccle-
siastical conu-
fance.

Ante 86.

Executor sued
to make di-
tribution.

Executor will
not give cau-
tion.

Oath refused.

Monk made
executor.

Executor cannot sue before probate.

shall be against the abbot and the monk, and the execution will be of the goods of the house. And *Turton* justice agreed with *Holt* chief justice *in omnibus*. But *Rokeby* justice seemed to be of opinion, that the grievance in the present case would be properly remedied by appeal. And he said, that in the province of *York* security was always given upon the granting of the probate of a will, without any dispute made about it. Upon which a day was given to *Dr. Waller*, to certify the King's Bench, by producing precedents, whether the practice had been in the prerogative court to take caution in such case. At which day no precedent of it being shewn, nor satisfaction thereof given to the court; *Holt* chief justice with the concurrence of the other judges pronounced the opinion of the court, that a peremptory *mandamus* ought to be granted in this case; because the ecclesiastical court cannot require caution in this case. 1. For when a man is made executor, nobody can add qualifications to him, other than those which the testator has imposed; but he shall be who, and in what manner, the testator shall judge proper. 2. The executor has a temporal right, of which he is barred by the refusal of the probate, inasmuch as he cannot before probate sue in *Westminster-hall*. 3. There are no precedents in the canon law, to warrant this; and the practice has been always contrary. And if any cases happen, in which equity may be requisite; there is another channel here, where it runs, without resorting to the spiritual court, *viz.* chancery. A peremptory *mandamus* was granted. And note, *Mr. Robert Eyre* told me, that the lord chancellor *Somers* well approved this resolution.

Jackson *vers.* Pigott.

S. C. 1 Salk.
127, 129.
Carth. 459.
Bill accepted
after it was
payable.
Comyns 75.
12 Mod. 410,
212.
Pest. 574.

Assumpsit upon a bill of exchange. The plaintiff declares, that *J. S.* drew a bill of exchange upon the defendant dated the twenty-fifth of *March* 1696, payable within one month after; that afterwards, *viz.* such a day in *April* 1697 he shewed the bill to the defendant, and he promised to pay it *secundum tenorem et effectum billae praedictae*. *Non assumpsit* pleaded, and verdict for the plaintiff. *Sir Bartholomew Shower* moved in arrest of judgment, that the promise was void, because impossible to be performed, the day of payment being past at the time of the acceptance of the bill, and so impossible to be performed *secundum tenorem et effectum billae praedictae*; all which appears upon the plaintiff's declaration. To which *Mr. Northey* for the plaintiff answered, that it will amount to a promise, to pay generally. Of which opinion was the whole court. And *Holt* chief justice took the distinction, where the day of payment is past at the time of the

the acceptance, as it was in this case, and where the day of payment is to come. In the former case acceptance to pay *secundum tenorem et effectum billae* will amount to a general acceptance to pay the money; *contra* in the latter case. For in the former case it is impossible to pay the money as the bill appoints. But he said, that it had been better in this case, to have declared of a general Declaration; promise, without having restrained it by the *tenorem et effectum billae*. And (by him) in such case the acceptance of a bill amounts to an express promise to pay it. But (by him) if the plaintiff declares, that the acceptance was before the day appointed for the payment, and that he accepted to pay it *secundum tenorem et effectum billae praedictae*; and it appears upon the evidence, that the acceptance in fact was after the day of payment; that would be against the plaintiff. Judgment for the plaintiff.

Evidence varies from the declaration.

Covenant. The plaintiff declared upon an indenture of settlement upon marriage, by which the father settled certain lands to the use of J. S. for four years, and afterwards to the use of the son for life, and then to the daughter for life, and then to the first, second, &c. sons of their two bodies in tail, &c. and the father covenanted, that the lands so limited in jointure, after the expiration of the four years, should be, and for ever continue of the annual value of 200*l.* *per annum*; and the breach was assigned, that the lands were not of such value. This action was brought by the son against the executor, who demurred to the declaration. And Mr. Ward took exception, that this covenant did but extend to the estate for life limited to the wife for her jointure, and then the son cannot have an action. For the words [estate so limited in jointure] restrained it to this estate only; and the security must be intended to have been for the benefit of the wife only, to the end that she might be certain of a jointure of such a value. And it cannot be intended, that the father meant to oblige himself to secure it to his son. And he cited *Hob. 273, 329. 2 Saund. 413. Allyn 10. 2 Ventr. 140.* cases where covenants are restrained by the intent of the parties. That the words [for ever continue] cannot be construed, to make a perpetual covenant, but must have some restriction; and that which he had mentioned, seemed to be the most proper; and that if this construction were not made, the words [so limited in jointure] would be idle and of no effect; for it does not appear, that there were any other lands comprised in the deed. But *Northey* for the plaintiff argued, that the covenant is, that after the four years the lands should be and continue for ever, &c. Now the son having by the limitation of the deed the next immediate estate after the four years expired, if this covenant is not construed to extend to him, it will be destroyed;

Covenant, by whom suable? *Palm. 558. 2 Lev. 26, 92. 1 Vent. 175. 2 Keb. 831. Hob. 275. Skin. 40.*

Exposition of sentences.

Diversity.

since his estate commences immediately upon the expiration of the four years. Which *Holt* chief justice granted, and said, that the words [lands so. limited in jointure] were only a description of the lands to which the covenant should extend; and it is advantageous to the wife that the lands should be of such value to the son of her husband, for she may live in a more plentiful manner. And as to the objection, that the words would be idle and of no effect, he answered, that notwithstanding any thing to the contrary appearing to the court, there might be other lands mentioned in the deed; and if the defendant would have taken advantage of this exception, he should have prayed *oyer* of the deed, to the end that it might have appeared, that there were no other lands comprised; for the plaintiff has no need to shew more of the deed in his declaration, than concerns his case. And as to the extensiveness of the covenant he took this difference, that it would extend to all estates raised by the deed. As if *H.* limits an estate to *A.* for life, remainder to *B.* for life, remainder to the first, second, &c. sons of their two bodies, remainder to his own right heirs, with such a covenant annexed to it, it will extend to the estates for life, and the estates tail; but if for default of issue of the bodies of *A.* and *B.* the reversion descends to the collateral or lineal heir of *H.* he shall never take advantage of it, because he is not privy to the consideration of the deed, nor party to the deed, nor is his estate raised by the deed. But if in such case the remainder had been limited to the right heirs of *A.* or *B.* or of *J. S.* they might sue upon this covenant, because they had taken by the limitation of the deed, and are privy to it. Judgment was given for the plaintiff by the whole court. *Ex relatione m'ri Jacob.*

Rex *vers.* Bradford.

Indictment for
not perform-
ing a promise.
Salk. 379. p.
25. In Bani-
ham's case.

MR. *Upton* moved to quash an indictment, in which *Bradford* was indicted, for not curing the pox of *J. S.* in three weeks, contrary to the promise of the defendant, he being a physician; and the whole fact specially set forth in the indictment. And it was quashed, *nisi*, &c. by *Rokeby* and *Turton* justices, *absente Holt* chief justice.

Cook *vers.* Harris.

Intr. 10 Will. 3. B. R. Rot. 490.

THE plaintiff brought debt against the defendant as assignee of a term, being executor of the first lessee; in which the plaintiff declared, that he demised a mesuage to John Harris for the term of twenty one years, rendering 60*l.* per annum rent, et quod postea, viz. primo Julii, totum residuum termini praedicti annorum devenit per assignationem to the defendant; and this action was brought for rent due at the Michaelmas following. The defendant pleads, quod ante diem solutionis redditus praedicti, aut aliqua pars inde devenit debita, she assigned totum statum, interesse, et terminum suum viginti et unius annorum, to J. S. viz. 29 Junii, and that the assignee accepted it, &c. The plaintiff replies, that the defendant assigned totum jus titulum statum interesse et residuum dicti termini ipsius Mariae (viz. the defendant) in narratione praedicta superius specificata et expressa, to defraud the plaintiff. The defendant rejoins, and traverses the fraud. Upon which the plaintiff demurs. And Mr. Northey took exception to the plea, because it appears that the defendant assigned before the term was assigned to her by the assignment, of which the plaintiff declares; but she does not say, that she assigned after. Now it may be, that it was re-assigned to her again upon the first of July, which is very consistent with her plea, and then she shall pay the plaintiff his rent. But if the plea had been, that after the defendant was assignee she assigned, viz. such a day, which in fact was before the day of the assignment to her mentioned in the plaintiff's declaration, there the viz. had been void, and the plea good. But contra, since the words post assignationem are not in the plea. And per Holt chief justice, this plea ought to have said post assignationem; for the defendant must either traverse the assignment mentioned in the plaintiff's declaration, or confess and avoid. And therefore here if the plaintiff had not replied, this plea had been ill; but here the plaintiff has aided it by his replication, where he says, that the defendant assigned totum jus titulum statum interesse et residuum dicti termini ipsius Mariae in narratione praedicta superius specificati, &c. And (by him) the ancient method of pleading assignments was, virtute cujus the assignee entred and was possessed; but that is disused now, for the assignee has the estate in him before entry, though not to bring trespass. And (by him) if there be an agreement between the lessor and lessee, that the lessee shall pay the rent at the beginning of every year before hand; when the lessee at the end of the first year pays his rent (which he designs for the year following)

A repugnant
videlicet is
void.
Assignment
pleaded in
debt for rent
against the
assignee.
Replication
aids a vitious
plea.

Trespass.

Rent when
due?

Assignment
over pleaded
without no-
tice.

3 Lev. 295.
3 Rep. 338.

yet in judgment of law it is rent for the year past; and so the lessee in judgment of law pays no rent for the last year of the term. Then *Rokeby* justice took exception to the plea, that it is not said, that the plaintiff had notice of the assignment. And he said, that it was adjudged in the Common Pleas between *Tovey* and *Pitcher*, that in such case there ought to be notice. [See 2 *Ventr.* 234. Note, Mr. *Place* told me, that he was in the Common Pleas when this case of *Tovey v. Pitcher* was adjudged; and judgment was given by *Pollexfen*, *Powell* and *Rokeby*, that the lessor ought to have notice, contrary to the opinion of *Ventris*.] But *Holt* chief justice said, that judgment of the Common Pleas was reversed in the King's Bench upon error brought, by the opinion of the whole court; which reversal was grounded upon the reason of *Walker's* case, 3 Co. 23, &c. Judgment was given for the defendant.

Yard. *vers.* Eland.

S. C. 12 Mod.

207.

S. C. 1 Salk.

117.

Carth. 462.

Bro. Execu-
tors 147.

1 Salk. 306.

Jenk. 79. p.

56.

6 Mod. 93.

Husband and
wife join in
action.

Assumpsit. The plaintiff declares, that forasmuch as the defendant was indebted to the plaintiff's wife as executrix of *J. S.* for arrears of rent incurred in the life-time of *J. S.* the defendant assumed to the plaintiff, that in consideration that the plaintiff at the special instance and request of the defendant would forbear to sue the defendant until *Michaelmas* next following, he would pay the money to the plaintiff, &c. and that the plaintiff *assumptioni* of the defendant *fidem adhibens* forbore to sue, &c. until *Michaelmas*, &c. and avers, that his wife is alive, and that the defendant has not paid the money. And upon *non assumpsit* pleaded, verdict for the plaintiff. And *Gould* King's serjeant moved in arrest of judgment, 1. That the wife ought to have been joined, because the husband has this debt in right of the wife, as she is executrix; and then this promise will follow the nature of the debt, and shall be *assets*; and therefore the wife ought to be joined. The case in *Yelv.* 84. and 2 *Cro.* 210. says, that it was ill for want of averment that the wife was alive; but it does not say, that it had been good if her life had been averred. And the case 1 *Sid.* 299. *Tyrrell v. Bennet*, is where the debt was in the proper right of the wife; but here the original debt is due to the wife as executrix, and the debt when recovered must be *assets*, which could not be, if the nature of the contract were altered, for then it would be a *devastavit*; and if it be not altered, the wife ought to be joined. But Mr. *Cartbew* argued *e contra*. Of which opinion was the whole court. For *per Holt* chief justice, the wife could not be joined here, because she is neither privy to the contract, nor the person to whom the money ought to be paid. If the money had been to be paid to the wife, then there might have been some reason to join her with the husband. For if *A.*

assumes

assumes to B. to pay money to C. upon good consideration, C. may have an action against A. for this money. But here the payment was appointed to be to the husband, and reasonably; for by the marriage the whole administration devolves upon him, and he might have released this debt, and therefore forbearance by him is a good consideration to maintain *assumpsit*. But a recovery in this action would make a new contract, which would amount to a *devastavit*. (For it will not be *assets* of the testator's estate; for if the husband dies before execution sued, the executor or administrator of the husband, and not the wife shall sue execution; and it will not be like a recovery by both of them.) And then the husband will be chargeable to pay out of his own estate as much as he has recovered; but the old debt cannot be extinguished until the money be paid to the husband; for the promise is only a more substantial security, or rather another security, for the debt; but it cannot extinguish it, because it is of an inferior nature. But it might be a question, if the wife died after judgment in this action, and before execution, by what means a man might make his *assets*; for it has been adjudged, that where an administrator recovered in trover for goods, and before execution the administration was repealed, the defendant maintained *audita querela*. If an executor submits to an award, it is a *devastavit* after the award made. 21 H. 7. 29. If a woman executrix marries a man, who commits a *devastavit*, it is a *devastavit* in both, and upon *devastaverunt* returned, judgment shall be against them both; and if the husband dies, it shall survive against the wife. Then serjeant Gould took another exception, that it is not averred, that when the defendant desired a day of payment, the plaintiff consented to give it him; but it is only said, *quod assumptioni fidem adhibens* he forbore; so that the defendant might remain in fear all the time, and then the consideration fails. But to this it was answered by the court, that it is averred that the plaintiff forbore, &c. which is sufficient consent. Judgment for the plaintiff.

Busshell *vers.* Lechmore.

Covenant for non-payment of rent. The defendant pleaded eviction, and concluded with a traverse, that he at any time enjoyed the land from the time of the eviction until the day upon which the rent became due. The plaintiff replies, that he entered by virtue of a power reserved to him in the lease, and traverses the eviction. The defendant demurs. And Holt chief justice took exception to the plea, that the traverse was immaterial; but yet he was of opinion, that it would not vitiate the plea; because where a traverse is immaterial, the adverse party is not excluded.

Traverse upon a plea, is not to be concluded from an answer, but may reply, and traverse the material part of the plea. And therefore this is aided by the general demurrer. But if it had been shewn for cause upon a special demurrer, it had been ill. But then he was of opinion, that the traverse in the plaintiff's replication was an answer to the defendant's plea; and then the defendant, by not taking issue, has vitiated his plea, for whether the plaintiff entered by virtue of any power, or whether he was a mere trespasser, if the defendant was not evicted, it will be no suspension of the rent. Judgment for the plaintiff. *Ex rel. m^ri Jacob.*

Contra, 1 Roll. Ab. 938. G. H.

Johnson *vers.* Long.

THE plaintiff brought an action upon the case against the defendant; and declared, that the defendant 21 April 9 Will. 3. erected a wall, which stopped the ancient lights of the plaintiff's house, &c. The defendant pleads, that the plaintiff brought another action in Easter term last past, for the erecting of this wall the first of October before, and recovered; and avers, that it was for the same erecting, &c. The plaintiff demurs. And judgment for the defendant. For though he might have another action for the continuance, yet he cannot have another action for the same erection. Judgment for the defendant.

Rex *vers.* Gall.

AN information was exhibited against the defendant upon the statute of 5 & 6 Ed. 6. cap. 14. par. 9. for having bought live cattle, and having sold them again, not having depastured them five weeks in his own pasture, &c. Upon not guilty pleaded, a special verdict was found, in which the act of general pardon 6 & 7 Will. 3. cap. 20. was found, by which all offenses (except those thereafter excepted) committed before the twenty-ninth of April 1695, were pardoned; then follows an exception (upon which the question in this case arose) of all offenses committed contrary to any statute, or to the common law, for which any information, &c. at any time within two years next before the day of assembling and holding of the said parliament, or at any time since, had been commenced or sued, &c. in any of his majesties courts at Westminster, &c. and is depending and remaining to be prosecuted, &c. and the jury find, that no information was commenced, &c. or depending, &c. against the defendant for this offense at the day of assembling and holding of the said parliament, nor within two years before; but that this information was commenced

commenced and sued against the defendant afterwards, and before the twenty-ninth of *April* 1695, and was then depending; and if this offense be pardoned, then they find the defendant not guilty, and if not, then guilty, &c. And it was argued by Sir *Bartholomew Shower* for the defendant, that these relative words in the exception, viz. at any time since, &c. should be expounded to refer to the first day of the assembling and holding of the parliament, which is the first day of the session, at which time this statute by relation was a law, for the judges cannot take notice of the time when it passed the royal assent. 1 *Sid.* 310. And therefore since the session begun the twelfth of *November* 6 *Will.* 3. and at that time there was not any information depending, the defendant was not by the exception exempted from the benefit of the pardon.

Exposition of sentences.

But against this it was argued by Mr. *Northey* for the informer that though an act shall be construed generally to relate to the first day of the session, yet that does not hold when there is a particular day mentioned, in which case the relation of the act is confined to such a day. *Plowd.* 79. b. *Bro. parliament*, 86. *Hob.* 222. And he cited some cases, where things done in the term shall not relate to the first day of the term. 1 *Sid.* 373, 432. and 4 *Co.* 70. *Hynde's case*. A deed inrolled generally of such a term may by averment be tied to the particular day upon which it was inrolled.

To what day a statute shall relate.

Then since the twenty-ninth of *April* is appointed by the parliament, for the time to which the pardon shall extend; and since the act, by mentioning any time since, and which remains to be prosecuted, shews that it refers to another time since the first day of the session, that ought to be understood of the twenty-ninth of *April* to which the pardon extends; and more especially since the same clause of exception refers as to another particular to the thirtieth of *April*. Of which opinion was the whole court. And they held, that the exception ought to be taken as generally, and as large, as the purview; for the parliament could never design, that their pardon should extend to pardon offenses until the twenty-ninth of *April*, and that notwithstanding their exception, which restrains it from pardoning those which they thought unworthy of their pardon, should be so short, and that such should be unpunished. Wherefore they held Sir *Bartholomew Shower's* construction absurd, and for this reason were all ready to pronounce judgment against the defendant. But then another exception was

started by the defendant's counsel in arrest of judgment; that in this case no information will lie in the King's Bench for this offense; because by 21 *Jac.* 1. cap. 4. it is enacted, that all informations, &c. upon penal statutes shall be prosecuted before justices of assize, nisi prius, oyer and terminer, and gaol-delivery, and justices of peace, &c. having power to inquire, hear and determine them; and not in the courts of *Westminster*, nor in other place, &c. and that

Motion in arrest of judgment after special verdict argued.

21 *Jac.* 1. c. 4.

Neither information upon a penal act, nor debt upon it, lies in the King's Bench.

How justices
of peace may
proceed upon
5 & 6 Edw. 6.
cap. 14. par.
10.

3 Lev. 71.

that if such prosecution should be in any other place, it should be void. And therefore since power is given by the act 5 & 6 Edw. 6. to the justices of peace, to inquire of such offenses at their sessions, this prosecution by the statute 21 Jac. 1. is absolutely void. But it was argued by Mr. *Wells* for the King, that this case is different from all other cases upon penal statutes. For by him, 1. Though the statute 21 Jac. 1. appoints the prosecution of offenses against penal statutes to be before justices of assize, of the peace, &c. yet the statute extends only to such things whereof the said courts had consueance before. 2. It extends only to such things, whereof they might inquire before by verdict of twelve men. Now this offense, for which the information is exhibited against the defendant, was not an offense at common law; then the justices of peace cannot have any other jurisdiction than that which is given them by the statute; but the statute 5 & 6 Edw. 6. cap. 14. par. 10. does not give them power to inquire by verdict of twelve men or a jury; but it gives them power to proceed in a summary way, by examination of two justices; for the statute gives them power to make process, as though they had power to try by inquisition; which is a plain intimation, that they had not power to try by inquisition. 2. The words are, that they shall inquire, hear and determine, &c. by inquisition, presentment, bill or information, before them exhibited, and by examination of two lawful witnesses; or by any of the same ways or means, &c. Now the words hear and determine ought to be applied to the examination of two witnesses; for it would be absurd to say, that they should hear and determine upon inquisition, for that is only a bare accusation. Then they not having power to proceed to the examination of these offenses by jury, the statute of 21 Jac. 1. does not extend to them; and therefore the information well lies. But if the words of the statute had been [hear and determine] generally, that would have been understood by verdict, &c. *Sed non allocatur.* For *per Holt* chief justice the word [or] disjoins the intire sentence, and therefore the justices may proceed by any of the said methods. And the whole court were of opinion, that this information was restrained by 21 Jac. 1. cap. 4. And *Holt* chief justice said, that he was of opinion, that actions of debt upon penal statutes were within the 21 Jac. 1. cap. 4. though it was otherwise adjudged between *Barnes* and *Hughes*, 1 *Ventr.* 8. And *Hale* chief justice was of the same opinion with *Holt*, and thought that there was no difference between an action of debt upon a penal statute, and an information, they being only different ways of proceeding to recover the penalty, for that may be as well recovered before justices of peace by information as by action of debt. But *Rokeby* and *Turton* justices said, that informations in the name of the attorney general were with-

within the express words of the 21 Jac. 1. But as to actions of debt upon penal statutes, they would not give any opinion. And for this reason only judgment was, that the information should be quashed, because contrary to the statute 21 Jac. 1. cap. 4. *nisi*, &c. But the last day of the term Mr. Mountague offered for cause, why the information should not be quashed; that (by him) the buying and the selling make but one offense; then if the buying happens in one county, and the selling in another, the justices of peace of neither county can proceed; which would make a failure of justice, if the superior courts are abridged from intermeddling. ^{Failure of justice.} And though in the present case both the buying and the selling were in the same county, that will not alter the law. And he cited *Latch* 192. as in point, 3 *Keb* 247. And to the end that in this vacation the law, as well with regard to informations as to actions of debt upon penal statutes, might be settled by all the judges, this case was adjourned till the next term. And Holt chief justice said, that the statute 21 Jac. 1. cap. 4. principally aimed at the court of *Star-Chamber*, which at the time of the making of the act had assumed an exorbitant jurisdiction. *Adjournatur*. And afterwards, as Mr. Robert Eyre told me, the matter was compounded.

Hil. 10 Will. 3. Holt reported the opinion of all the Judges to the serjeants to be, 1. That debt would not lie in the King's Bench for a common informer, unless the cause of action arose in *Middlesex*; and then it would lie in the King's Bench. 2. That where a remedy is given by debt, &c. by subsequent statutes, in any court of record, the act of 21 Jac. 1. will not extend to it, for they are a repeal as to this purpose of the statute 21 Jac. 1. But (by him) where a subsequent act gives a popular action, it ought to be brought in the proper county within the equity of 21 Jac. 1.

There was a case between *Danby* and *Lavees Pasch*. 8 *Will. 3.* C. B. Debt for for exercising the trade of a coach-maker, not having served an apprenticeship, &c. according to 5 *Eliz. cap. 4.* *Nil debet* pleaded. Verdict for the plaintiff. And motion was made in arrest of judgment, that debt does not lie by 21 Jac. 1. cap. 4. but the penalty ought to have been sued for before the justices of assise, &c. *Sed non allocatur*. For *per curiam*, debt lies in such case in the common pleas; for otherwise the statute 21 Jac. 1. would be construed, to take away all actions of debt, &c. which was not the intent of the act. But then judgment was stayed until, &c. because it was a question to the court, whether the trade of a coach-maker was within the statute of *Elizabeth*.

Savill *vers.* Roberts.

Intr. Trin. 9 Will. 3. B. R. Rot. 724.

S. C. 12 Mod.

208, 211.

S. C. 1 Salk.

13.

5 Mod. 405.

Carth. 416.

Error upon
judgment in
C. B.

10 Mod. 217.

12 Mod. 257.

1 Sid. 424.

1 Saund. 228.

Willielmus tertius Dei gratia Angliae Scotiae Franciae et Hiberniae rex fidei defensor, &c. dilecto et fideli suo Georgio Treby militi capitali justiciario suo de banco salutem. Quia in recordo et processu acetiam in redditione judicii, quae fuit in curia nostra coram vobis et sociis vestris justiciariis nostris de banco inter Jacobum Roberts et Willelmum Savile nuper de Mexbrough in comitatu, &c. armigerum de quadam transgressione super casum eidem Jacobo per praefatum Willelmum illata, ut dicitur, error intervenit manifestus ad grave damnum ipsius Willelmi, sicut ex querela sua accepimus; Nos errorem, si quis fuerit, modo debito corrigi, et partibus praedictis plenam et celerem justitiam fieri, volentes in hac parte, vobis mandamus, quod si judicium inde redditum sit, tunc recordum et processum praedicta cum omnibus ea tangentibus nobis sub sigillo vestro distincte et aperte mittatis et hoc breve, ita quod ea habeamus a die paschae in quindecim dies, ubicunque tunc fuerimus in Anglia, ut inspectis recordo et processu praedictis, ulterius inde pro errore illo corrigendo fieri faciamus, quod de jure et secundum legem et consuetudinem regni nostri Angliae fuerit faciendum. Teste meipso apud Westmonasterium decimo sexto die Februarii anno regni nostri nono.

Hungerford.

Responsio Georgii Treby militis capitalis justiciarii infra nominati.

Recordum et processum loquelaе unde infra fit mentio cum omnibus ea tangentibus coram domino rege ubicunque, &c. ad diem infra contentum mitto in quodam recordo huic brevi annexo, prout interius mihi praecipitur. Geo. Treby.

Placita irrotulata apud Westmonasterium coram Georgio Treby milite et sociis suis justiciariis de banco de termino sanctae trinitatis anno regni domini Willelmi tertii Dei gratia Angliae Scotiae Franciae et Heberniae regis fidei defensoris, &c. octavo. Rot. 1737.

Declaration in
case for mali-
ciously and
falsely pro-
curing a man
to be indicted
of a riot.

Eborum ff. Willelmus Savile nuper de Mexbrough in comitatu praedicto armiger attachiatus fuit ad respondendum Jacobo Roberts de placito transgressionis super casum, &c. Et unde idem Jacobus per Robertum Darwent attornatum suum queritur, quod praedictus Willelmus Savile, machinans et nequiter et malitiose intendens ipsum Jacobum minus rite praegravare ac eum variis laboribus et expensis praetextu

praetextu et colore justitiae et legis processus defatigare opprimere et multipliciter damnificare, sine causa rationabili, ex malitia sua praecogitata apud Barnesley in comitatu praedicto apud generalem quarterialem sessionem pacis domini regis tentam per adjournamentum ibidem pro le West riding in comitatu praedicto quinto decimo die Octobris anno regni domini regis nunc septimo coram Georgio Cooke baronetto, Michaele Wentworth, Wilhelmo Lowther militibus, Roberto Monkton, Godfrido Boswile, Richardo Nettleton, Johanne Bradshawe, Nonus Parker armigeris, et aliis justiciariis dicti domini regis ad pacem in le West riding in dicto comitatu conservandam nec non ad diversa felonias transgressiones et alia malefacta in le West riding comitatus praedicti perpetrata audiendum et terminandum assignatis, &c. ipsum Jacobum Roberts et quosdam Richardum Offerton generosum, Wilhelum Shertcliffe, Thomam Middleton, Samuelem Roberts, Ellenam Roberts viduam, Thomam Roberts, Richardum Holden, Thomam Sheepshanke, Antonium Hendley, Jonathanem Crosse, Georgium Sheepshanke, Antonium Roberts, Benjaminum Nicholson, et uxorem ejus, Georgium Littlewood, Josephum Dell et Jonathanem White, per nomina Richardi Offerton nuper de Skirburgh in comitatu praedicto generosi, Wilhelmi Shertcliffe nuper de eadem laborer, Thomae Middleton nuper de Mexbrough in comitatu praedicto laborer, Samuelis Roberts nuper de Beneby in comitatu praedicto laborer, praedicti Jacobi Roberts nuper de eadem laborer, Ellenae Roberts nuper de eadem viduae, Thomae Roberts nuper de eadem laborer, Jonathanis Crosse nuper de Skirburgh in comitatu praedicto laborer, Georgii Sheepshanke nuper de Beneby praedicta laborer, Anthonii Roberts nuper de eadem laborer, Benjaminum Nicholson nuper de eadem laborer, et uxoris ejus, Georgii Littlewood nuper de Skirburgh praedicta laborer, Josephi Dell nuper de Beneby praedicta laborer et Jonathanis White nuper de eadem laborer, de eo quod ipsi secundo die Octobris anno regni domini Wilhelmi tertii Dei gratia nunc regis Angliae, &c. septimo vi et armis apud Beneby praedictam in le West riding comitatus praedicti riotose routose illicite et injuste sese assemblaverunt et congregaverunt, et adtunc et ibidem riotose et routose obstupaverunt cum quibusdam postibus pagulis et repagulis quandam viam pertinentem praedicto Wilhelmo Savile pro convendendis decimis granorum et feni ipsius Wilhelmi Savile a villa de Beneby praedicta usque ad villam de Mexbrough praedictam, ita quod idem Wilhelmus Savile eadem via sicut praeantea gaudere non possit; et alia enormia eidem Wilhelmo Savile intulerunt ad grave damnum ipsius Wilhelmi et contra pacem dicti domini regis nunc coronam et dignitatem suas, necnon contra formam statuti, &c. falso indictari malitiose fecit et procuravit, ac indictamentum illud versus ipsum Jacobum Roberts falso et malitiose persecutus fuit et persecutum esse causavit, quousque idem Jacobus Roberts postea scilicet ad generalem sessionem quarterialem pacis dicti domini regis

regis tentam in et pro le Westriding comitatus praedicti apud Pontefract vicefimo primo die Aprilis anno regni domini nostri Wilhelmi tertii Dei gratia nunc regis Angliae, &c. octavo coram Henrico vicecomite Downe Lionello Pilkington baronetto et aliis sociis suis justiciariis dicti domini regis ad pacem in le Westriding in comitatu praedicto conservandam, necnon ad diversa felonias transgressiones et alia male facta in le Westriding comitatus praedicti perpetrata audiendum et terminandum assignatis, debito modo secundum legem et consuetudinem hujus regni Angliae inde acquietatus fuit. [And then he lays it for procuring him to be indicted by another indictment for a riot committed in the same manner the third of October, &c. as aforesaid.]

Prout patet
per recor-
dum, &c.

Quorum quidem praemissorum praetextu idem Jacobus Roberts non solum in bonis nomine fama credentia et aestimatione suis praedictis quibus praeantea gavisus fuerit magnopere laesus ac in diversis negotiis licitis et honestis agendis multipliciter impeditus existit, verum etiam idem Jacobus valde graves et arduos labores subire et diversas denariorum summas pro acquietatione sua praedicta et ejus exoneratione in hac parte expendere et erogare coactus et compulsus fuit, ad damnum ipsius Jacobi Roberts viginti librarum, Et inde producit sectam, &c.

Et praedictus Wilhelmus Savile per Wilhel mum Allabie attornatum suum venit et defendit vim et injuriam quando, &c. et dicit quod ipse in nullo est culpabilis de praemissis praedictis superius et impositis prout praedictus Jacobus superius versus eum queritur; Et de hoc ponit se super patriam, et praedictus Jacobus similiter. Ideo praeceptum est vicecomiti, quod venire faciat hic a die sanctae trinitatis in tres septimanas duodecim, &c. per quos, &c. qui nec, &c. ad recognoscendum, &c. quia tam, &c. Ad quem diem jurata inter partes de praedicto placito posita fuit inde inter eas in respectum usque ad hunc diem scilicet a die sancti Michaelis in tres septimanas tunc proxime sequen. nisi justiciarii domini regis ad assisas in comitatu praedicto capiendas assignati per formam statuti, &c. die sabbati vicefimo quinto die Julii proxime praeterito apud castrum Eborum in comitatu praedicto prius venerint, &c. Et modo hic ad hunc diem venit praedictus Jacobus per attornatum suum praedictum et praefati justiciarii ad assisas coram, &c. miserunt hic recordum suum in haec verba. Postea die et loco infracontentis coram Edwardo Ward milite capitali barone scaccarii domini regis et Johanne Turton milite uno justiciariorum dicti domini regis ad placita coram ipso rege tenenda assignatorum justiciariis ipsius regis ad assisas in comitatu Eborum capiendas assignatis per formam statuti, &c. venit infranominatus Jacobus Roberts per attornatum suum infracontentum, et infra scriptus Wilhelmus Savile licet solemniter exactus non venit sed defaultam fecit; Ideo jurata unde infra fit mentio capiatur versus eum per defaultam et juratores juratae illius exacti quidam eorum, viz. Samuel Midgley Wilhelmus Metcalfe Radul-

Postea.

Radulphus Marsden Abrahamus Haigh Robertus Taylor Richardus Burton Christophorus Shaw Johannes Telborne et Johannes Pilling veniunt et in jurata illa jurati existunt; Et quia residui juratorum ejusdem juratae non comperuerunt, ideo alii de circumstantibus per vicecomitem comitatus praedicti ad hoc electi ad requisitionem praedicti Jacobi Roberts ac per mandatum justiciariorum praedictorum de novo apponuntur, quorum nomina panello infra scripto affilantur secundum formam statuti in hujusmodi casu nuper editi et provisi; Ac juratores sic de novo appositi, viz. Thomas Ward Wilhelmus Pulleine et Johannes Priest, exacti similiter veniunt, qui ad veritatem de infracententis simulcum aliis juratoribus praedictis prius impanellatis et juratis dicendam electi triati et jurati dicunt super sacramentum suum, quod praedictus Wilhelmus Savile est culpabilis de praemissis interius ei impositis modo et forma prout praedictus Jacobus interius versus eum queritur, et assidunt damna ipsius Jacobi occasione infra scripta ultra misas et custagia sua per ipsum circa sectam suam in hac parte apposita ad undecim libras, et pro misis et custagiis illis ad quadraginta solidos: Et quia justicarii hic se advisare volunt de et super praemissis, priusquam judicium inde reddant, dies datus est praefato Jacobo hic usque in octabas sancti Hilarii de audiendo inde judicio suo, eo quod iidem justicarii hic inde nondum, &c. Ad quem diem venit hic praedictus Jacobus per attornatum suum praedictum. Et super hoc visis praemissis et per justiciarios hic plenius intellectis, Consideratum est quod praedictus Jacobus recuperet versus praefatum ^{Judgment.} Wilhel mum damna sua praedicta ad tresdecim libras per juratores praedictos in forma praedicta assessa, necnon decem et septem libras eidem Jacobo ad requisitionem suam pro misis et custagiis suis praedictis per curiam hic de incremento adjudicatas, quae quidem damna in toto se attingunt ad triginta libras; Et praedictus Wilhelmus in misericordia.

The single question of this case was, if *A.* procures *B.* falsely and maliciously to be indicted of a riot, upon which indictment *B.* is acquitted; whether *B.* may have an action against *A.* for so falsely and maliciously procuring him to be indicted? And after verdict for the plaintiff, this was moved in arrest of judgment by serjeant *Lutwyche* for the defendant. And it was argued by serjeant *Wright* for the plaintiff in *Michaelmas* term 8 *Will.* 3. *C. B.* And after having been argued two or three times at the bar of the court of Common Pleas, the judges in *Hilary* term 8 *Will.* 3. pronounced their opinions in solemn arguments. And *Nevill* and *Powell* justices held, that the action would well lie. But *Treby* chief justice was of opinion against the action. Whereupon judgment was entred for the plaintiff. Upon which error was brought for the defendant in *B. R.* And it was argued by Sir *Bartholomew Shower* for the plaintiff in error, and by myself for the defendant, *Hil.* 9 *Wil.* 3.

B. R. and by *Mr. Hall* for the plaintiff, and *Mr. Northey* for the defendant, *Pasch. 10 Will. 3. B. R.* And now in this term *Holt* chief justice pronounced the resolution of the court, that the action would well lie; and therefore all the court was of opinion, that the judgment ought to be affirmed. And *Holt* chief justice said, that this point is not *primae impressionis*, but that it has been much unsettled in *Westminster-hall*, and therefore to set it at rest is at this time very necessary. And, 1. he said, that there are three sorts of damages, any of which would be sufficient ground to support this action. 1. The damage to a man's fame, as if the matter whereof he is accused be scandalous. *Yelv. 46. 2 Cro. 32.* And this was the ground of the case between *Sir Andrew Henley* and *Dr. Burstall*, *Raym. 180.* But there is no scandal in the crime for which the plaintiff in the original action was indicted. 2. The second sort of damages, which would support such an action, are such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty, which has been always allowed a good foundation of such an action, as appears by the statute *de conspiratoribus* (in the printed book said to be made 33 *Edw. 1.* but in fact it was made 21 *Edw. 1.* as my lord *Coke* observes, 2 *Inst. 562.*) where the parliament describes a conspirator, and the statute of *Westm. 2. cap. 12.* which gives damages to the party falsely appealed, *respectu habito ad imprisonamentum et arrestationem corporis*, and also *ad infamiam*; but these kinds of damages are not ingredients in the present case. 3. The third sort of damages, which will support such an action, is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge. That a man in such case is put to expenses is without doubt, which is an injury to his property; and if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself. And though this doctrine has been questioned lately, it was always received in ancient times. 3 *Edw. 3. 19. 3 Assis. pl. 13. 7 Hen. 4. 31. a. 11 Hen. 7. 25, 26. Fitzh. nat. br. 116. Stile 379. Atwood v. Monger.* But it was objected at the bar against these old cases, that they were grounded upon a conspiracy, which is of an odious nature, and therefore sufficient ground for an action by itself. But to this objection he answered, that conspiracy is not the ground of these actions, but the damages done to the party; for an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution. 9 *Co. 57. W. Jones 93*, but if the party be damaged, the action will lie. From whence it follows, that the damage is the ground of the action, which is as great in the present case as if there had been a conspiracy. And *Fitzh. nat. br. 114. b.* says, that where two cause a man to be indicted, if it be false and malicious, he shall have conspi-

Damages to support an action.

1. Scandal.

2. Damage to the person.

3. Damage to the property.

Conspiracy without damage is no ground for an action.

conspiracy; where one, he shall have case: so that the actions are founded upon one common foundation, but the number of the parties defendants determines it to the one or to the other. 2. Though in the old books such actions are called conspiracies, yet they are nothing in fact but actions upon the case. For conspiracy (to speak properly) lies only for procuring a man to be indicted of treason or felony, where life was in danger. *Fitzb. nat. bre. 116. a.* [Note, *Treby* chief justice was of the same opinion in *C. B.*] And if such an action be sued against two defendants for procuring a man to be indicted of a smaller offense, though the word *conspiraverunt* be in the writ, yet if one of them be acquitted, the other may be found guilty. 11 *Hen. 7. 25.* 2 *Inst. 562.* 1 *Saund. 228.* 1 *Roll. Abr. 112.* *Contra*, of a proper action of conspiracy; for there if the one be acquitted, no judgment can be given against the other. But conspiracy, though it be not put in execution, is a crime, and is punishable in the lect. But in an action for a conspiracy no villainous judgment shall be given, unless the life was endangered by that conspiracy; and therefore where it is brought for a trespass, it is only an action upon the case.

Writ of conspiracy, for what it lies?

Objection. The opinion of the judges in the case of Sir *Andrew Henley* and Dr. *Burstell*, *Raym. 180.* was, that no action will lie for falsely and maliciously procuring a man to be indicted of a trespass. He said that he remembered that they were of such opinion, and denied the case of 7 *Hen. 4. 31.* But to that he answered, that though he had a great regard to what the judges then said, for the court was then composed of very knowing men, yet that opinion was not judicial, for such matter was not then in question. But in this case if the grand jury had found *ignoramus*, no action had lain against *Savile* for preferring the bill, because *Roberts* had not been imprisoned, nor scandalised, nor put to expenses.

Ignoramus returned to an indictment.

Objection. Such actions will discourage prosecutions, and there is no more reason that an action should be maintainable in this case, than where a civil action is sued without cause, for which no action will lie. If a man slanders another by suing of an action in a proper court, no action will lie for it. 2 *R. 3. 9, 10.* *Keilw. 26.* Answer. There is a great difference between the suing of an action maliciously, and the indicting of a man maliciously. When a man sues an action, he claims a right to himself, or complains of an injury done to him; and if a man fancies he has a right, he may sue an action. 4 *Co. 17.* makes a difference, that if a man calls *A.* who is heir at law to *B.* a bastard, *A.* may have an action against the man; but if the man says *A.* is a bastard, and I am heir to *B.* no action lies. If then the law will permit a man to make a false claim out of a court of justice, *a fortiori* when he proceeds to assert his right

Pledges.

Original of costs.

For suing an action.

right in a legal course. 2. The common law has made provision, to hinder malicious and frivolous and vexatious suits, that every plaintiff should find pledges, who were amerced, if the claim was false; which judgment the court heretofore always gave, and then a writ issued to the coroners, and they assessed them according to the proportion of the vexation. See 8 Co. 39. b. *Fitzh. nat. bre.* 76. But that method became disused, and then to supply it, the statutes gave costs to the defendants. And though this practice of levying of amercements be disused, yet the court must judge according to the reason of the law, and not vary their judgments by accidents. But there was no amercement upon indictments, and the party had not any remedy to re-imburse himself, but by action. 2. If *A.* sues an action against *B.* for mere vexation, in some cases upon particular damage *B.* may have an action; but it is not enough to say that *A.* sued him *falso et malitiose*, but he must shew the matter of the grievance specially, so that it may appear to the court to be manifestly vexatious. 1 *Saund.* 228. 1 *Sid.* 424. *Daw vers. Swain*, where the special cause was the holding to excessive bail. But if a stranger, who is not concerned, excites *A.* to sue an action against *B.* *B.* may have an action against the stranger. *Fitzh. nat. brev.* 89. m. 3 *Cro.* 378. and 2 *Inst.* 444, 5.

Objection. The case of *Chamberlain v. Prescott*, *Raym.* 135. *Holt* chief justice answered, that he had a manuscript report of the said case of *Bridgman* chief justice of the Common Pleas, written with his own hand, where the case is reported to be thus: *Chamberlain* brought an action upon the case against *Prescott*, in which he declared, that the defendant *Prescott* caused him *falso et malitiose* to be indicted upon the 8 *Eliz. cap.* 2. for having caused *C.* to be arrested at the suit of *S.* without his consent, of which he was acquitted, &c. after verdict for the plaintiff it was moved in arrest of judgment in the King's Bench, and judgment was entred for the plaintiff; upon which error was brought in the exchequer-chamber, and after the restoration that case had the great debate; and the judgment of the King's Bench for maintaining of the action was reversed. *Bridgman* chief justice was against all such actions. But it appears by his report, that this was not the reason of the reversal of the judgment, but because *Chamberlain* was indicted for that which was no offense at all; for in fact *Prescott* arrested *C.* in his own name and the name of *S.* for a debt due to them jointly, which was lawful without the consent of *S.* and if *S.* did not appear, if it were in a personal action he might be nonsuit, if in a real action, summoned and severed; and therefore it was held to be no offense.

A. indebted to *B.* and *C.*
C. procures *A.* to be arrested without the consent of *B.*
 this is not within 8 *Eliz. cap.* 2.

Objection.

Objection. Yet *Chamberlain* was put to expense. **Answer.** If he had been guilty, he could not have been damaged, for the judgment must have been arrested. In 3 *Cro.* 236. this point came in question, and in it the court were divided; but in *Chamberlain's* case it was held clearly to be out of the statute; then since the offense for which he was indicted, was not any offense, he put himself to unnecessary charges in the defense of himself. For the same reason it is held 9 *Edw.* 4. 12. that if a man be prosecuted upon an ill indictment, an action will not lie. In *Cro. Car.* 294. 1 *Roll. Abr.* 112. the matter of scandal was not such whereof the common law takes notice. And in 2 *Mod.* 51. there is the same difference taken and allowed. But *per Holt* chief justice, though this action will lie, yet it ought not to be favoured, but managed with great caution. For if the indictment be found, the defendant in such action will not be bound to shew a probable cause, but the plaintiff will be constrained to shew express malice and iniquity in the prosecution. 2. If *ignoramus* be returned, where the indictment neither contains matter of scandal nor cause for imprisonment or loss of life or limb, no action will lie; but if there is scandal, or loss of liberty, &c. an action will lie. The whole court being of this opinion, the judgment was affirmed. *Hil.* 34 & 35 *Car.* 2. *B. R. Shutter's* case; and *Dobbins v. Sir Richard Newdigate* at the end of the reign of *Charles II.* case for falsely and maliciously indicting them of a trespass, and after verdict for the plaintiffs, and motion in arrest of judgment, judgment was given for the plaintiffs.

Platt *vers.* Hill.

ACTION upon several promises. *Indebitatus assumpsit* for 94*l.* 10*s.* and *quantum meruit* for another sum of 94*l.* 10*s.* and *infinimul computasset* for 72*l.* 10*s.* and they were laid 9 *Will.* 3. The defendant pleaded, that he was indebted to the plaintiff, before the act of composition, for goods sold, in several sums, *in toto se attingentibus* to 72*l.* 10*s.* *et non ultra*; and then he pleads the statute of 8 & 9 *Will.* 3. *cap.* 18. which makes a composition made by two thirds of the creditors in number and value to be binding to the rest; and then he brings himself within the compass of the act, and shews a composition made, &c. and demands judgment, if he ought to be sued, before the time appointed by the composition is expired. The plaintiff demurred. And *Hall* took several exceptions to the plea. 1. That the act of parliament is misrecited, the words [secret and fraudulent] being omitted; and if a man undertakes to recite an act of parliament, and misrecites it, though he was not obliged to have recited it, this makes the plea

vicious. 3 Cro. 236. 1 Bulstr. 218. 1 Sid. 214. *Sed non allocatur.* For *per curiam*, this being a private act, the court must take it to be as it is pleaded. 1 Sid. 356. unless the plaintiff denies it, as he might, by pleading *nil tiel record*, or by alleging that it is farther enacted, &c. and then if it is material, he shall take advantage of it. And *per Holt* chief justice, if a publick act be misrecited in the time, if the plea be tied up to the statute, which the defendant has pleaded, by *vigore statuti praedicti*, or *contra formam statuti praedicti*, this misrecital will be fatal: but if the conclusion be *contra formam statuti* generally, the judges will take judicial notice of it as much as if it had been shewn in the plea. The same law of any other variance. Then *Hall* took another exception, that this contract appears to have been made after the act of composition, and therefore not within the intent of the act; for the *assumpsit* and debt are laid 9 Will. 3. and the act was the eighth. And *Treby* chief justice refused to discharge a man, who had contracted a debt subsequent to the act. But to this *Grove* answered, that this being a contract raised by the law, the plaintiff might lay it any day, and if this should put it out of the intent of the act, the statute would be intirely evaded. *Sed non allocatur.* For *per curiam*, the act relating to particular persons absconding or in prison at such a time, it cannot be intended, but for such debts as they then owed; and not where such a person gains sufficient credit to be intrusted afterwards. And then the time being material, the defendant should have traversed, *absque hoc quod assumpsit modo et forma* after the day mentioned in the act. For the promise is not a promise every day, for if a man brings *indebitatus assumpsit*, and declares of a promise in *November*, the defendant pleads a release the first of *May*, he ought to traverse, *absque hoc* that he assumed *modo et forma* after the first of *May*. 3. A third exception was, that there is an *indebitatus assumpsit* for 94 l. to which the defendant has not given any answer. And for this reason the whole court held the plea to be ill, for not having given an answer to the whole. And therefore judgment for the plaintiff.

Private statute, misrecital.
The statute of composition was a private statute.

Statute misrecited.

Ante 211.

Adjudged accordingly this term in C. B. between *Clod* and *Carter*.
Ex rel. m'ri Place.

Statute of composition does not extend to debts contracted after the statute.

Traverse.
Plea, which does not go to the whole, ill.

Nelson vers. Finch.

Condition performed.

DEBT upon bond conditioned, that whereas the plaintiff became bound to the defendant in a bond of 52 l. conditioned for the true payment of 26 l. the twenty-ninth of *September* following; if after the discharge of the said bond by the plaintiff the defendant should make the plaintiff free of the cloth-makers company upon request, that then this bond should be void; the plaintiff shews that he had paid the 26 l. but the payment was not upon

upon the 29th of *September*, but afterwards, and that he requested the defendant, but that he had not made him free. And upon demurrer judgment was given for the defendant, because this payment of the 26*l.* could not discharge the first bond, being after the day; and therefore the plaintiff has no title to sue this bond as yet; because the defendant is not bound to make him free of the cloth-makers company, until the first bond be discharged. Note, it was said by Mr. *Crispe* the common serjeant, that if a man trade upon his own account within the seven years of his apprenticeship, the chamberlain of *London* will not make him free, because he has not fully served an apprenticeship of seven years.

Payment after the day is no discharge of a bond.

But now, quære the stat. 4. 5. *Annæ.* Freedom of a trade.

A. Had made composition with his creditors according to the late act; and being sued by a nonsubscribing creditor, he moved for leave to file common bail, upon suggestion, that the debt, upon which the plaintiff brought his action, according to the proportion of his composition, would be less than 10*l.* and since the plaintiff, though a nonsubscribing creditor, was bound by that agreement, it is reasonable, that common bail should be accepted. But the motion was opposed, because it would amount to a determination of the merits of the cause. And it was compared to the case of a usurious contract, where though the contract be void, the defendant is compelled to give special bail. *Quod curia concessit.* For the plaintiff here may traverse, that the defendant absconded the nineteenth of *November*, &c. and also that the subscribing creditors were real creditors. But if the plaintiff had been summoned before a judge, then the matter would have received a determination as the statute directs; or if the plaintiff had been a subscribing creditor, and that had appeared to the court, it would have been reasonable to allow common bail, because his subscribing had been a confirmation of the composition against himself.

S. C. 1 Salk.

he 99.

Special bail.

Salk. 100.

Scire facias was sued *teste* 12 *Februarii* returnable *quindena Paschæ*. Between the *teste* and the return the statute of 8 & 9 Will. 3. cap. 11. for preventing of frivolous and vexatious suits was made, which gave costs upon a *scire facias*. And Mr. *Cartwright* moved for costs, because the return of the writ was after the twenty-fifth of *March*, and that then properly the suit commenced. But denied *per curiam*, because the statute subjecting the defendant to a charge, shall be construed strictly, and in strictness the action commences from the *teste*. And so it is held, where a *limitat* is *teste* within the six years, and returnable after, this will prevent the statute of limitations. And perhaps if the plaintiff had been liable to pay costs, when he sued this *scire facias*, he would

Costs upon

scire facias by 8 & 9 Will. 3. c. 11.

Statute of limitations prevented.

Post. 434, 553, 880.

would not have sued it; and therefore when he has recovered, it is unreasonable to give him costs.

Vinkensterne *vers.* Ebdn.

Intr. Mich. 8 Will. 3. B. R. Rot. 45.

S. C. 12 Mod.
216.
S. C. 1 Salk.
248.
5 Mod. 356.
Carth. 357.
Distress for
toll.
3 Lev. 37,
38.

Condition
precedent
ought to be
averred to be
performed.

TRover for an anchor, sails, and cables. Upon not guilty pleaded, special verdict, that the town of *Newcastle* is an ancient town and corporation, time whereof, &c. known by the name of *The mayor and burgessees of Newcastle*; that within the town there is, and time whereof, &c. hath been, a custom, that the mayor and burgessees have used from time to time to repair the port of the town, and that in consideration thereof they have used to have a toll of 5*d.* per *chaldron* for all coals exported; and that for default of payment they have used by their water-bailiff for the time being to distrain *quaecunque bona* of the exporter, who refused to pay the toll, *per legem Angliae fuerunt distringibilia*; then they find that the defendant was water-bailiff constituted by the mayor and burgessees *debito modo*; that the plaintiff loaded so many chaldrons of coals, the duty of which amounted for toll to 7*l.* the exporter refused to pay it, and therefore the said anchor, sails, and cables, being parts of the tackle of the said plaintiff's ship, the defendant took as a distress for the toll, &c. and if the goods are *in tali casu per legem terrae distringibilia*, they find for the defendant; *si non*, then for the plaintiff. And this case was argued *Trinity term 9 Will. 3.* by Mr. *Cheatham* for the plaintiff and Mr. *Chesbyre* for the defendant, and in this term by Mr. *Broderick* for the plaintiff, and by Mr. *Northey* for the defendant. And Mr. *Broderick* argued, that the words [*in tali casu*] would not tie the verdict to the special conclusion, for they ought to be understood, in such case as is found by the special verdict; and therefore he has liberty, to take as many exceptions as he pleases. And therefore, 1. he took exception, that the toll being founded upon the consideration of the repairing of the port, it should have been found that the mayor and burgessees used to repair it; for this is like a condition precedent, and therefore performance ought to be averred; for there being no remedy, to compel them to repair the port, it should have been averred, that it is in repair. And this is like the case in 5 *Co.* 78. *b.* of the custom of *Potwater*. *Hob.* 42. 27 *Affis.* 15. *Dier* 117. *a.* where the avowant shews, that the bridge was in repair. 1 *Roll. Rep.* 1. 2 *Bulstr.* 201. where the bell-man avers, that he had paved the streets. And this being a duty against common right, the court will intend nothing that is not found.

found. 2. Exc. It is a prescription to take the goods of one man or the offense of another man; for the custom is, to take the goods of the exporter, who is the owner and not the master, but here the goods are taken from the master, because the toll is not paid by the owner, which is ill. 1 *Leon.* 105, 231. 3 *Cro.* 227. *Hern. plead.* 607. *Dier* 199. *b. pl.* 57. 3. That the toll was unreasonable, viz. 5 *d. per* chaldron, which is worth no more than 2 *s.* See *Moor* 474. 4. That these goods are privileged, and cannot be distrained, 3 *Cro.* 550, 569. *Noy* 68. and the rather because *Newcastle* is a market for coals, which privileges the ship coming to the market to fetch them. But admitting that they were distrainable, yet they ought to shew, that there was no other sufficient distress; as the case is of cattle of the plough. *Co. Lit.* 47. *a.* 1 *Sid.* 348. *pl.* 14. *Dier* 312. *a. pl.* 86. *Fitzh. nat. bre.* 90, 174. 20 *Edw.* 4. 3. 13 *Co.* 2. 5. They are not within the custom; for the custom is, for all coals exported from the port of the town of *Newcastle*, but these coals are found to be exported from the port of *Newcastle*. Now the port of *Newcastle* extends much farther than the port of the town.

One shall not be punished for the offense of another.

Unreasonable distress.

But Mr. *Northey* for the defendant argued, that Mr. *Broderick* was concluded by the special conclusion of the verdict, to take these exceptions. For where the jury make a special conclusion, the court cannot consider any thing, but what was specially referred to them by the jury. 5 *Co.* 97. 1 *Cro.* 21. *Moor* 267. *pl.* 420. So that all the exceptions but the fourth are out of the case. And as to that he said, that sails, anchor and cables are distrainable as reasonably as any other thing. For suppose the plaintiff to be the exporter, and the person who is properly obliged to the payment of the Duty; his goods ought to be liable to the distress for the toll. In case of rent the *averia carucae* are not privileged, where there is not other distress sufficient: and that law is founded upon the statute of 51 *Hen.* 3. See 2 *Inst.* 132, 585. *Co. Li.* 47. *a.* But the law does not privilege a ship from distress. Doubtless a ship in a yard may be distrained for rent issuing out of the yard. In *Dier* 117. *a. pl.* 73. a ferry boat distrained.

Special conclusion in a verdict.

But *per Holt* chief justice, supposing that there was no special conclusion here, yet he was of opinion, that these exceptions were not good. For, 1. By him, there is not any necessity to aver here, that the port was in repair; for the consideration is, that they have used time whereof, &c. to repair, &c. so that the consideration is, that they have been time whereof, &c. obliged to repair, and not the actual repairing of it. 2. This duty of 5 *d. per* chaldron is not unreasonable, for the court cannot take notice of the price for which they are sold. 3. To speak properly in the way of trade,

Averment.

Notice.

Exporter, who?

Maldon corporation.

3 Keb. 281, 532.

Custom of land-cheap.

Que estate in a corporation.

What things distrainable?

Distrains for toll.

the owner of the goods is the exporter; but as to the duties of the port, the master of the ship is the exporter, and satisfies and discharges all such duties; for it would be very unreasonable to drive the mayor and burgessees, or the owner of the toll, to send to seek the merchant. And this is the constant usage. It is very reasonable that such duties should be paid, for without ports there would be no navigation, and without a duty the port would not be repaired, &c. And Holt chief justice cited a case of Maldon in Essex. The corporation there prescribe in a *que estate*, that they and all those, &c. time whereof, &c. have used to repair the port, in consideration whereof they have used time whereof, &c. to receive for all lands sold within the precinct of the borough, a certain rate of 10d. in the pound out of the purchase money; and it was adjudged a good custom; and this is what they call *land-cheap*; for the landholder reaps a benefit by the trade coming to the town by reason of the port. And it was objected there against the prescription, because it was laid with a *que estate*, but it was held well enough, for a man may have had the borough, and may have granted it to the corporation. Now this present case is much stronger, the duty being paid by the trader, who reaps the benefit of the port. 4. It is true, that a horse cannot be distrained in a smith's shop, &c. but there is no such restriction where the distress is for a personal duty. The duty in this case arises out of the goods laden to be exported; so that by their being laden the duty commences, and the ship becomes chargeable, and *a fortiori* any part of her. Doubtless any other goods of the person who ought to pay the duty may be distrained as well as those for which the duty is payable. If a man ought to pay a penny a head as toll for twenty sheep, any of the sheep may be distrained for the whole duty. 5. Newcastle in general understanding is a town, and then *portus Newcastle* is the port of the town of Newcastle, and all one. Judgment for the defendant.

Harrison *vers.* Cage and his Wife.

S. C. 1 Salk. 24.
S. C. 12 Mod. 214.
Carth. 467.
5 Mod. 411.
Consideration of *assumpsit*, that whereas A. promised to marry B. she promised to marry him.

CASE. The plaintiff declared, that in consideration that he promised the defendant's wife to marry her, she being then sole, she assumed and promised to the plaintiff to marry him; and though the plaintiff was ready, and often offered, to marry the defendant's wife, &c. Upon *non assumpsit* pleaded, verdict for the plaintiff, and 400*l.* damages. After motion for a new trial, and denial of it, Mountague moved in arrest of judgment, that the action would not lie for want of a consideration. For though in such case a woman may have an action against a man, the reason of that is, because marriage is an advancement to the woman, but it

it is no advancement to the man, and therefore the consideration fails, *Hob. 10.* And he cited the case *de causa matrimonii praelocuti*, which lies for the woman, and not for the man. *Co. Li. 204. a. Fitzb. nat. bre. 205.* And the case in *1 Roll. Abr. 22. pl. 20.* is where the woman brought the action. And he cited also the opinion of *Vaughan* in the case of *Dickinson and Holcroft, Carter 233.* 2. Exc. That there is no time prefixed, and he does not shew a request with a parson. But this last exception was not regarded; for as to the time, it should be in convenient time; and as to the request with a Parson, that was over-ruled in *Dickinson and Holcroft's* case. Which case, though it was debated in *C. B.* yet upon error brought in *B. R.* it was affirmed upon the first opening. Besides, that in this case it appears that the defendant has disabled herself by marriage from the performance of her promise. And as to the first exception, *per Holt* chief justice, there is the same consideration in the case of the promise of a woman, as in that of a man; for the ground of the action, where the woman brings the action, is the promise of the woman; for the action being founded upon mutual promises, if the woman's promise be void, the man's promise will be *nudum pactum*. The case upon the writ *de causa matrimonii praelocuti* is antient law, and stands upon its own bottom. *Vaughan* chief justice grounded his opinion upon this matter's being of ecclesiastical conusance; for if the contract were *per verba de praesenti*, it cannot be discharged; and if a man have damages in an action for it, that would discharge the contract. Objection. That there might be some disability, which might hinder the performance, which is properly conusable in the Spiritual Court. Answer, Such disability might be pleaded, as consanguinity within the *Levitical* degrees, or it might be given in evidence upon *non assumpsit* pleaded. Precontract is a disability, but it will not avoid the performance of your promise, because it proceeds from your own act. And (by him) marriage is an advancement as much to the man as to the woman. But *Rokeby* justice, took time to consider that, and at another day delivered his opinion also for the plaintiff; because marriage is an advancement as much to the man as to the woman. And to prove that, he relied upon the cases, where a man brings an action for scandalous words, by which he lost his marriage. *1 Roll. Rep. 79. 2 Bulstr. 276. 3 Bulstr. 48. 2 Cro. 323. 1 Cro. 269.* And if a man covenants, in consideration of a marriage to be celebrated, to stand seised, this will raise a use. And for these reasons judgment for the plaintiff. Note, it was ruled in this case at *Norfolk Summer assises* last past, by *Ward* lord chief baron, that this promise had no need to be in writing by the statute of frauds, *29 Car. 2. cap 3.* And Mr. *Northey* said at the bar, that the statute intended only agreements to pay marriage portions, and that

Promise in writing
Contra adjudged 3 Lev. 65.
2 Salk. 438.

that it had often been ruled so by *Holt* chief justice. *Quod Holt non negavit.*

Goods wrecked shall not pay custom.

Post. 501.

PER *Holt* chief justice, always since the case of *Shepard v. Gosnold, Vaugh.* 159. it has never been made a doubt, but that wreck shall not pay custom. And mention being made, that this point had been argued between Sir *William Courtney* and *Bower* three or four times in *C. B.* he said, that he would not have suffered more than one argument, if it had been in the King's Bench, and that *pro forma tantum.*

Northcott vers. Underhill.

Intr. *Trin.* 10 *Will.* B. R. Rot. 204. Error. *C. B.*

S. C. 1 *Salk.* 199.

Where a covenant shall be good, though the deed be void?

Owen 136.

Lev. 45.

Yelv. 18.

2 *Brownl.*

161, 164, 5.

Raym. 27.

Declaration in covenant.

They do not give day in writ of inquiry in *C. B.*

Per sacramentum duodecim.

Covenant. The plaintiff declares, that the defendant by his deed bearing such a date granted, bargained and sold, released, and confirmed, such lands to the plaintiff and his heirs, provided that if the defendant should pay so much money at such a day, that he might re-enter, &c. and then follows a covenant for the payment of the money; and the breach was assigned in non-payment. And judgment for the plaintiff in *C. B.* by default, and a writ of inquiry of damages executed, and final judgment for the plaintiff. Upon which error is brought. And Mr. *Cartbew* took exception. 1. That since nothing passed by the deed, it not being inrolled, the covenant to pay the money was void. And he compared it to the case of *Capenbursf v. Capenbursf, Raym.* 27. *Sed non allocatur.* For *per curiam*, though nothing passes by the deed, yet the covenant to pay the money is good, and does not depend at all upon the passing of the estate by the deed. In the case in *Raym.* 27. the covenant was, that the covenantee should enjoy the term, which was impossible, where no term passed by the deed. But this covenant for the payment of the money is a separate and independant covenant. And it is not necessary, to shew in this action, that any estate passed; but the more safe method of declaring is, *quod per indenturam testatum existit*, and then shew the covenant. Then Mr. *Cartbew* took another exception, that no day was given upon the writ of inquiry, and therefore it is a discontinuance. *Sed non allocatur.* For they never give a day in *C. B.* upon a writ of inquiry; nor is it necessary, for nothing is to be done but to ascertain the damages. 3. Exc. That it is said upon the writ of inquiry, *per sacramentum duodecim*, and it does not say, *proborum et legalium hominum.* *Sed non allocatur.* For the entries in *C. B.* are always so. Judgment was affirmed.

Hyleing *vers.* Hastings.S. C. 1 Salk.
28, 29.

Carth. 470.

5 Mod. 425.

S. C. Comyns

54.

S. C. 12 Mod.

223.

12 Mod. 557,

577, 8.

Chanc. Prec.

386.

6 Mod. 309,

310.

11 Mod. 37.

10 Mod. 314.

1 Lev. 110.

Statute of li-

mitations

evaded.

Express pro-

mise will re-

vive.

Bare acknow-

ledgment.

A man assumes

to pay a debt

contracted

during his in-

fancy.

See 1 Roll.

Ab. 18. V. 1, 2.

Statute of li-

mitations a

good act.

for what he had paid before. And therefore this statute ought to be favoured as much as a fine and non-claim. The principal case was adjourned, to be argued at the chief justices chamber before the judges of the King's bench this vacation. *Adjournatur. Ex relatione m^ri Jacob. Post. 421.*

Pitts *vers*. Polehampton.

S. C. 3 Salk.
305.
Repleader.

Argumenta-
tive issue.

CASE. The defendant pleaded the act of composition, by which it is enacted, that two thirds of all the real creditors in number and value shall bind the rest; and that *A. B. and C.* being two thirds in number and value of the real creditors, made such an agreement, &c. The plaintiff replies, *quod duae tertiae partes in numero et valore realium creditorum non fecerunt agreementum tale, &c.* And issue was joined thereupon. And verdict for the plaintiff. And it was moved, that this was a *jeofaile*, and not aided by any statute, and therefore a *repleader* ought to be granted. And it was urged, that this was a *jeofaile*, because this matter was not issuable, since there is a special method directed by the act, by which the reality of the creditors may be tried, *viz.* summoning them before a master in Chancery, and compelling them to swear, that their debts are *bona fide* contracted; which if the plaintiff has omitted, he shall not put it in issue afterwards. And as to that the court held, that in this case, that part of the act not being pleaded, the court could not take notice of it, because it is a private act. But if it had been pleaded, the court seemed to incline, that the difference would be, where the party was summoned, and where not, because he had not any opportunity to make inquiry into the reality of the creditors. But the issue being here, not upon the reality of these creditors, but only that two thirds did not subscribe, though the whole act had been pleaded, the plaintiff might have taken such an issue; though the most proper issue had been, to have said, that these *A. B. and C.* were not two thirds, &c. for this issue in the present case is but argumentative; nevertheless it being found for the plaintiff, he must have judgment. Judgment for the plaintiff. Sir *Francis Winnington* in a motion in this case one day said, that this issue was aided by the statute of *jeofailes*; for where the defendant's plea confesses the duty of the plaintiff, and issue is joined upon an immaterial point, and found for the plaintiff, he shall have judgment; which *Hale* chief justice used to say, was the true reason of *Nichol's case*, 5 Co. 43. *Quod Holt* chief justice *concessit*, and said, that it was very shortly reported in *Coke*. And he took this difference, where the defendant's plea confesses the duty demanded by the plaintiff, and does not

not avoid it sufficiently, if the issue be immaterial, and found for the plaintiff, he shall have judgment; but if the defendant's plea goes in discharge of the action, and issue is taken immaterial-ly, and verdict for the plaintiff, a repleader shall be granted. See 3 Lev. 297.

Rex vers. major', &c. Coventry.

A *Mandamus* was directed to the defendants, to command them to restore *Oldham*, to be one of the council-house in *Coventry*. They return, that they are, and time whereof, &c. have been, a corporation by prescription known by such a name; and that King *James I.* by his letters patent dated in the nineteenth year of his reign, reciting that they had a custom to elect any one to be of the common council, and to remove him *ad libitum*, and reciting other customs; the King confirmed to them all their said liberties; and then they conclude, that by force of the said custom time whereof, &c. used, *et secundum formam praedictarum litterarum patentium*, they removed *Oldham*. And Mr. *Northey* took exception to the return, that by the election *Oldham* had an estate for life, and then a custom to remove an officer for life without cause is not good. *Sed non allocatur per Holt* chief justice. For 1. He is not returned to be an officer for life, but *e contra*, because it is returned, that he might be removed at pleasure. And if the constitution in the corporation be to elect officers, either by a particular number of persons, or to elect *ad libitum*, &c. in such case they ought to pursue their customs; and they cannot elect in other manner, or for a longer or more durable interest; and his estate is always liable to the determination annexed to it by the custom. *Trin. 31 Car. 2. B. R. Rex. v. Repes.* In *mandamus* to restore *P.* to the recordership of *Cambridge*, they returned a custom, to chuse *ad libitum* or *ad terminum vitae*, and that they elected him, to hold *ad libitum*, &c. and that they removed him; and adjudged a good return. In the case of the lord *Hawles*, see *1 Ventr. 143.* in *mandamus* to restore him to be recorder of *Bath*; they return a custom, to elect a man learned in the laws of the land for their recorder, and that by the statute for purging of corporations the commissioners put in the lord *Hawles*, but because he was not learned in the laws of the land, they had deprived him; and it was adjudged a good return, for though the commissioners had power to put in a recorder, yet he ought to be such a person as was required by their constitution. And *Kelyng* chief justice held, that he might have cause for the false return, if he was learned in the laws of the land, and if it was found for him he should be restored. And if a steward be chosen according to the custom, to

S. C. 2 Salk.

430.

Mandamus to restore a man to be one of the council house of Coventry.

Ante 337.

Raym. 188.

Officer removable at the pleasure of a corporation.

Rex v. Repes, 2 Show. 69.

Recorder removed *ad libitum*.

continue

Seward re-
moveable at
pleasure.

The constitu-
tion ought to
be specially
shewn.

continue during pleasure, they may remove him, notwithstanding *Blagrove's* case. [See 2 *Raym.* 11. *Mich.* 1656. *B. R.*] 2. A second exception was, that they do not shew any foundation for this removal; for they insist upon their custom and the letters patent, but do not shew any such custom, but by way of recital in the letters patent, nor do they shew any clause of grant in the letters patent, which ought to have been pleaded specially. And of this opinion was the whole court. And therefore a peremptory *mandamus* granted, *nisi*, &c.

S. C. 2 Salk.

459, 460.

Carth. 454.

6 Mod. 116.

Lilly Entr.

81, 516.

S. C. 12 Mod.

63.

S. C. Comb.

481.

Case for stop-

ping lights,

per quas lumen

inferebatur, et

inferri consue-

vit et debuit.

Cro. El. 520.

Ro. Rep. 221.

Post. 713.

2 Ventr. 292.

Flerman v.

Chapman.

Rosewell *vers.* Prior.

CASE. The plaintiff declares, that he was possessed of a house, in which there were twenty-one windows, *per quas lumen inferebatur, et inferri consuevit et debuit* into the house; and that the defendant erected a shed upon the ground next adjoining, which stopped the lights, &c. Not guilty pleaded. Verdict for the plaintiff. Upon which it was moved in arrest of judgment by Mr. Mountague, that the declaration was ill, because neither the mesuage nor the lights are averred to be antient. And this case is distinguishable from the case of a wrong-doer; for here it is lawful for the defendant, to erect buildings upon his own soil (3 *Cro.* 118.) against the windows of another, unless they are ancient windows: which not appearing here, there is nothing to make this act a wrong in the defendant. And this difference will answer all the cases, where a bare possession has been held sufficient to maintain the action. See *Poph.* 170. 2 *Cro.* 373. *Yelver.* 215, 225. 1 *Cro.* 325. 1 *Roll. Rep.* 13. *Babington's* case. But after it had been argued two or three times at the bar, the court upon great consideration held, that it was good after verdict. For by reason of the words *consuevit et debuit* it must be intended, that a prescription was given in evidence. (As in fact it was in this case, for it was tried before *Holt* chief justice in *Middlesex*.) But *Holt* and *Turton* said, that it would have been ill upon demurrer. But *Rokeby* held, that it would have been good after demurrer. Cases cited for the plaintiff were 8 *Co.* 87. *Fitzb. entry* 15, 50. *Bro. bors de son fee* 1. *Fitzb. briefe* 674. 2 *Cro.* 43. *Owen* 109. 3 *Cro.* 335, 419. 9 *Co.* 53. b. 1 *Roll. R.* 393. *Trin.* 6 *Will. & Mar. Rot.* 550. *B. R. Stroud v. Birch.* Judgment for the plaintiff.

Hartfort *vers.* Jones, &c.

TRover for goods. The defendant pleads, that they were in S. C. 2 Salk. a ship, and that the ship took fire, and that they hazarded^{654.} their lives to save them; and therefore they are ready to deliver^{Salvage. Barnardist. 65.} the goods, if the plaintiff will pay them 4*l.* for salvage, &c. The^{Keb. 305.} plaintiff demurred generally. And Holt chief justice held, that they might retain the goods until payment, as well as a taylor, or Retainer. an hostler, or common carrier. And salvage is allowed by all^{12 Mod. 447.} nations, it being reasonable, that a man shall be rewarded, who hazards his life in the service of another. But though the detainer be lawful, yet it does not amount to a conversion, no more than a distress for rent. And he said, that he never knew but one special^{See 1 Roll. R. 1.} plea good in trover, except a release. And see *Yelv.* 198. a man may plead that specially, which he might give in evidence upon^{In trover nothing pleadable specially but a release.} not guilty, if he confesses and avoids the fact. For the reason^{Plea special. Latch 185. Yelv. 198.} why you may plead specially is not the doubt in the law; but it is, because the matter of the plea cannot be given in evidence upon^{Plea special. Latch 185. Yelv. 198.} not guilty. But this cannot be good though after a general demurrer, because it does not confess a conversion. A rule was made by consent, that the defendant should waive the special plea, and plead the general issue.

Lug *versus* Godwin.

SCire facias upon judgment against the defendant. He pleaded S. C. 12 Mod. in abatement, no specification. The plaintiff demurred in bar.^{214.} *Respondes ouster* was awarded. Afterwards the defendant pleaded^{S. C. 2 Salk. 599.} the same matter in bar. The plaintiff demurred. And Carthew^{Demurrer in bar to a plea in abatement.} took exception, that there was a discontinuance here; because upon the plea in abatement the plaintiff had concluded his demurrer as if it had been in bar. *Sed non allocatur.* For where the defendant pleads a good plea in abatement, and the plaintiff replies new matter, he ought to maintain his writ; but if the defendant pleads an ill plea, though the plaintiff replies and concludes in bar, it is not material. Then Carthew took exception to the writ; that it was to shew cause, why he should not have execution of the judgment, *et misis et custagiis in hac parte*, whereas it should have^{Post. 532.} been *in ea parte*. But upon search of the precedents Holt chief^{Scire facias to have execution of costs in hac parte.} justice said, that where the *scire facias* was sued against the defendant upon a judgment against himself, *in hac parte*, is well enough; but *contra*, if it be sued upon a recognisance against the bail, there it must be *in ea parte*. And therefore he thought, that

Burr v. Atwood, 2 Salk. 603.

such *scire facias* brought by *Atwood* against *Burr* was ill. *Intr. Pasch. 10 Will. 3. B. R. 152. Mich. 2 Will. & Mar. B. R. Rot. 150. Hill. 2 Will. & Mar. B. R. Rot. 717.* And this distinction will reconcile (by him) all the precedents. *Ex relatione m'ri Jacob.*

Rex vers. inhabitantes Rislip, Hendon, and Harrow.

S. C. 2 Salk. 524.
5 Mod. 416.
Order of two justices confirmed upon appeal conclusive.
2 Salk. 534, 536.

Thornton v. Pickering, Estoppel.
3 Keb. 200.
Cro. Ja. 535.
3 Mod. 164.

Two justices remove.

Several orders being removed into the King's Bench by *certiorari*, the case in effect appeared to be thus. *Edlin* came into the parish of *Harrow*, and being likely to become chargeable to the parish, two justices make an order, and remove him to *Rislip*: *Rislip* appeals to the quarter-sessions, and upon the appeal *Rislip* is adjudged to be the place of his last legal settlement; afterwards *Rislip* finds, that *Hendon* was the place of his last legal settlement, and that he had been adjudged upon appeal to be settled there; and upon this they remove him to *Hendon* by order of two justices; and upon appeal an order is made at the quarter-sessions, reciting all this matter, that he should be settled at *Rislip*. And the question was, if after the adjudication upon the appeal against *Rislip*, *Rislip* is not estopped as to all the world, to say, that it is not the place of his last legal settlement. And after it had been debated at the bar by Mr. *Northey* and Sir *Bartholomew Shower*, &c. *Holt* chief justice was of opinion, that *Rislip* is estopped; because if it had not been the place of his last legal settlement, upon the appeal *Edlin* had been sent back to *Harrow*; which being determined upon the appeal is conclusive, and there ought to be an end of suits. And he cited a case between *Thornton* and *Pickering*, where it was adjudged, that if a man be adjudged to be the father of a bastard by two justices, he is estopped against all the world, to say the contrary, and a man may justify the calling him so. The case was, *A.* libelled against *B.* in the spiritual court, for saying that *A.* had a bastard; *B.* for a prohibition suggested this adjudication before two justices; and the suggestion being turned into a declaration upon attachment upon the prohibition, the defendant pleaded, that the words were spoken at large, without relation to the adjudication of the justices; the plaintiff replied, and prayed judgment if the defendant was not estopped by this adjudication, to say that he had not a bastard; and judgment was, that *A.* was estopped. But *Turton* justice was of opinion, that it was very hard, to conclude *Rislip* against a third parish, which was discovered after the adjudication of the appeal, to be the place of the last legal settlement. And (by him) it is contrary to the practice of all the justices of *England*. *Ideo adjournatur.* Per *Holt* chief justice, if two justices make an order, to send a poor man

man from *A.* to *B.* *B.* ought to appeal, and cannot remove him to *C.* *Post.* 425.

Rex v. inhabitantes de Wangford in Suffolk.

AN order was made to remove three persons and their families. And it was quashed, because it was too general; for it might be, that some of their families were not removeable. If a man marries a poor woman, who is settled in *B.* and had children by a former husband, and he is settled in *A.* his wife shall be removed to him to *A.* but such of her children as are more than seven years of age shall not be removed; those under seven years of age may for cause of nurture, but ought to be maintained at the charge of the parish of *B.* *Per Holt* chief justice.

S. C. Carth. 449.
1 Sess. Ca. 1750. fo. 10, 29, 76, 140, 145.
2 Sess. Ca. 76, 77, 85.
Order to remove three persons and their families.
Wife removed to the husband.
Children.

Archbishop of Canterbury vers. Fuller.

TRespass was brought in an inferior court. And the defendant removed the cause by *habeas corpus* into the King's Bench. And upon not guilty pleaded, verdict for the plaintiff, and 12 *d.* damages. And Mr. *Turner* moved for full costs; because this cause, being removed by *habeas corpus* out of an inferior court, was not within the 22 & 23 Car. 2. cap. 9. And so it was held by *Northey* and the practisers, to be the course upon actions removed out of the *Marshalsea*, and other inferior courts. And so it was ruled here. *Ex relatione m'ri Jacob.*

Though the damages are under 40 *s.* in an action removed out of an inferior court by *habeas corpus*, yet the plaintiff shall have full costs.

Rex vers. Abbert Alberton.

AN order was made by two justices, that *A.* should maintain a bastard child, where the case was thus: A *feme coverte*, during the absence of her husband at *Cadiz*, was brought to bed of a bastard; and her husband was not in *England*, from the time of her conception till she was brought to bed. The order being removed into the King's Bench by *certiorari*, the question was, whether this child was a bastard within the 18 Eliz. cap. 3. the words of which statute are, children begotten and born out of lawful matrimony, which cannot be said of this case (as Sir *Bartholomew Shower* objected) the mother being married at the time of the birth of the child, so that there is a father bound to provide for it. And if such a mother should kill such a child, she could not be guilty of murder within the 21 Jac. 1. cap. 27. *Sed non allocatur.* For *per curiam*, he is a bastard who is begotten and born of a *feme coverte*,

S. C. 2 Salk. 483.
Carth. 469.
Bastard.
1 Salk. 122.

coverte, whilst her husband is beyond the four seas. And in a real action, if general bastardy was pleaded, the bishop ought to certify such a one bastard. Indeed in case of *bastard eigne* the bastardy must be pleaded specially; because such a one is *mulier* by the canon law, and the bishop would certify him such. And where a man is bastard, he is such to all purposes, and why not within 18th *Eliz.*? For though the statute of 21 *Jac.* 1. is a penal law, yet this act is a remedial law. But then exception was taken to the form of the order, because it is said, that the husband at the time of the begetting and birth was beyond the four seas; but it is not said, that he was not within them in the mean time, for if he was, the child was not a bastard. And for this exception the order was quashed. But he was bound in a recognizance, to appear at the next sessions. And *per curiam*, the constant practice has been so ever since the third of *Charles* I.

One committed for a fine escapes.

AN attachment was granted against a man, and he was reported in contempt; and being fined, and committed in execution for it, he escaped. And a motion was made for a new attachment; but *Holt* chief justice was of opinion, that a new attachment cannot be granted, but a special *scire facias* ought to be sued, reciting the whole matter, why the King should not have execution for the fine. But at another day (*absente Holt*) an attachment was granted.

Rex *vers.* Whiting.

S. C. 1 Salk.
283, 286,
287.
Witness.
Ray. 191.
Hob. 91.

Evidence.

AN information was preferred against *Whiting* for a cheat. And in evidence on the trial at *nisi prius* the fact was thus: His mother in law agreed to give him 5*l.* and he by some trick imposing upon her, obtained her hand to a note of 100*l.* for which he was now indicted. And upon the trial it was a doubt, whether the woman should be admitted to give evidence? And *Holt* chief justice held, that she being in some measure concerned in the consequence of this suit, it being some means to discharge her of the 100*l.* she should not be admitted to give evidence. For though the verdict in this information could not be given in evidence in a trial upon the note, yet doubtless they would mention it. And he could not distinguish this case from the case of perjury and forgery, where the party interested for the deed, or prejudiced by the perjury, shall not be admitted to prove the perjury or forgery: Ruled by *Holt* chief justice, at the sittings at *Guildhall*.

A Libel was preferred against a man in the spiritual court, for saying to another, Thou art *Beelzebub*. A prohibition was granted, though strongly opposed by Mr. Hall. *Thou art Beelzebub.*
Ante 21 2

Odes vers. Clerk.

Intr. Trin. 10 Will. 3. B. R. Rot. 475.

ESCAPE. The plaintiff declared, *quod prosecutus fuit extra curiam domini regis et nuper dominae reginae adtunc apud Westmonasterium existentem quoddam breve de latitat* against William Hickes returnable *quindena paschae coram dictis domino rege et domina regina ubicunque, &c.* which writ was directed to the defendant as sheriff of ; and that the defendant by virtue of this writ arrested the said William Hickes, and permitted him to escape, &c. Judgment by default, and writ of inquiry executed. Upon which Mr. Northey moved in arrest of judgment, that the plaintiff has not shewn out of what court the writ of *latitat* issued; for though it is returnable in B. R. yet it might issue out of the Common Pleas, and then it would be a void writ. And the sheriff shall take advantage of void process, though he cannot take advantage of voidable process. And he cited a case between *Webb* and *Hart*, or *Bray* and *Hart*, intr. Hill. 9 Will. 3. C. B. rot. 346. where in trespass the defendant justified under a *capias* and warrant thereupon; the plaintiff replied, *de son tort demesne, &c.* and judgment was given for the plaintiff, because it did not appear out of what court the writ issued. And though here there is the word *latitat*, yet that is used in the Common Pleas in the *testatum capias* and *capias utlagatum*. Sir Bartholomew Shower *e contra*. Of which opinion the court seemed to be; for the court said, that there is no writ properly called a writ of *latitat*, but that which issues out of the King's Bench; and therefore they seemed to be clear of opinion for the plaintiff. But *adjournatur*.

S. C. 5 Mod.

413.

Latitat peculiar to the

King's Bench.

Cowell's inter-
p. verb. *Latitat*.

Carth. 234.

Show. 254.

Sid. 53, 60.

Sty. 156.

8 Mod. 343.

Webb v. Hart.

Ought to shew
out of what
court the writ
issues.

Hook vers. Moreton.

MR. Eyre moved for a prohibition to be directed to the admiralty court, to stay a suit there upon a libel by the mate of a ship for mariners wages, upon suggestion of the several statutes, which restrain the admiralty from proceeding upon contracts made upon the land. And (by him) the admiralty has no original jurisdiction of such suits. 13 Rep. 51. And though they are in their nature

The King's

Bench will

not prohibit

all the mari-

ners, or one

of them, or

the mate of

a ship, to sue

in the admi-

ralty for their

wages.

Post. 632.

nature maritime, yet the place where the contract is made, alters the case. 12 Rep. 79, 80. Therefore the admiralty has no jurisdiction of charter-parties, nor of policies of assurance. 4 Inst. 141. Prohibition granted to a suit for mariners wages. 1 Sid. 331. Besides, that in this case this suit is by a single mariner; and therefore it is the same thing to him, to sue here at common law, or in the admiralty. And the case of *Woodward v. Bonithon*, Raym. 3. is a case in point. For though the suit was for other things as well as for mariners wages, yet if a prohibition had not lain for the wages, the prohibition should have been granted *quoad*, &c. Objection. 1 Ventr. 343. Answer. That is no authority in this case, because the motion was made there after sentence; and if it does not appear in the libel that the court had not jurisdiction, no prohibition shall be granted after sentence. See 2 Roll. Ab. 318. 12 Co. 77. Mr. Pratt against the prohibition argued, that if all the mariners sue for wages in the admiralty, the King's Bench at this day will never grant a prohibition, 1 Ventr. 343. and there is no difference, where the suit is by one mariner, or many, 2 Vent. 181. *Alleson v. Marsh*, in point; and the mate of the ship is but one mariner. Objection. Raym. 3. *Woodward v. Bonithon*. Answer. There the contract was for other things as well as for mariners wages, and the contract is intire. And *per curiam*, there is no difference, where one mariner libels, and where many. For the reason why the King's Bench permits mariners to libel in the admiralty for their wages, is not only because they are privileged to join in suit in the admiralty, whereas they ought to sever at common law, because the contracts are several; but also by the maritime law mariners have security in the ship for their wages, and it is a sort of implied hypothecation to them. Therefore the King's Bench allows mariners to sue in the admiralty for their wages, because they have the ship there for security. But the question is here, whether the mate of a ship differs from any other mariner; for if the plaintiff had been a single mariner, doubtless no prohibition would have been granted. And it seemed to the court, that a mate is but a mariner. And *per Holt* chief justice, heretofore the common law was too severe against the admiralty; it did not allow stipulations, but at this day they are always allowed. Ruled, that Mr. Pratt move the court for their opinion at another day.

Medena *vers*. Kilder.

Money
brought into
court.

AN action was brought by the plaintiff against the defendant for 100*l.* won upon a wager, that the peace would not be concluded by such a day. Sir *Bartholomew Shower*, after the rules for pleading were out, moved, that upon the bringing in of 100*l.* into court,

court, and upon payment of costs, the plaintiff might proceed at his peril; for the dispute was only, whether the plaintiff should have interest or not? And *per Holt* chief justice, interest is never Interest, given by the jury in such case in the damages. Ruled, that the defendant should shew cause, &c.

Baker vers. Swindon.

Intr. Mich. 10 Will. 3. C. B. Rot. 360.

AN action was brought against *Swindon*, one of the clerks of pronotary *Tempest*, &c. The defendant pleaded, that he ought to be sued by bill. And it was adjudged not; Because the clerks of the pronotaries of the Common Pleas, the serjeants, the clerks of the serjeants of the Common Pleas, and of the judges, have privilege to be sued in the Common Pleas by original writ, but not by bill. But the attornies of the Common Pleas ought to be sued there by bill, because they are supposed to be always present in court, but the others not. *Ex relatione m'ri Place.*

S. C. 3 Salk.
283.
1 Barnes 280.
S. C. cited.
Holt 589.
Privilege of
C. B.
Adj. P. 6
Will. & Mar.
C. B. Win-
ford, rot. 685.
Baker v. Dun-
calf, 3 Lev.
398.

Langton vers. Wallis. C. B.

DEBT was brought by the plaintiff, executor of *A.* against the defendant, as executor of *B.* formerly sheriff of the county of *D.* Upon *nil debet* pleaded, the jury found a special verdict, viz. that *A.* recovered a judgment against *F.* and sued a *capias ad satisfaciendum* directed to *B.* then sheriff, &c. which writ of *capias ad satisfaciendum* was executed by the under sheriff, and *F.* being in custody, assigned a term for years to the under-sheriff in satisfaction of the money recovered by the judgment, and to be discharged out of execution; and this assignment was to be void upon payment of the money recovered by the judgment at a day, after the office of *B.* to be sheriff should determine; and upon this *F.* was discharged out of execution, and at the day, &c. he paid the money to the under-sheriff; but the under-sheriff did not pay the said money to *A.* *B.* died; and *A.* died; and the plaintiff as executor of *A.* brought this action against the defendant. And it was adjudged, that it did not lie; because the release of *F.* out of custody was an escape in the sheriff, and the receipt of the money afterwards could not purge it. *Ex relatione m'ri Place.*

Escape.
1 Lutw. 582;
587.

Mich.

Mich. Term

10 Will. 3. C. B. 1698.

Sir George Treby *Chief Justice.*
Sir Edward Nevill
Sir John Powell
Sir John Blencowe

} *Justices.*

Challoner *vers.* Davies.

Intr. Hil. 9 Will. 3. C. B. Rot. 1175.

S. C. Lutw.
562.

Covenant. The plaintiff declared, that the plaintiff covenanted with the defendant, that the plaintiff, and all other persons having any estate under him, should make sufficient conveyance of certain land to the defendant and his heirs before the seventeenth of *November* next following; and that the defendant covenanted, that upon such conveyance made to him, he would pay to the plaintiff or his assigns, at the house of *Sir Francis Child, London*, 300 *l.* and that they mutually bound themselves, &c. in the penalty of 100 *l.* to the performance of the said agreement; and the plaintiff avers, that he was ready to perform all on his part to be performed; and that he and one *Markham*, who had a lease for years under the plaintiff of the said lands, bargained and sold the said lands to the defendant for one half year, and that the plaintiff by a release dated the day after released to the defendant and his heirs all his right, title, &c. of which lease and release the defendant had notice at *A.* in the county of *Bucks* the sixteenth of the said *November*, and there refused to accept them, and refused to pay the money to the plaintiff, *secundum formam* of the said covenant, &c. Upon which declaration the defendant demurred.

Birch serjeant for the defendant argued, that the declaration is not good; 1. For the plaintiff has not averred, that the lease and release were a sufficient conveyance. 2. The plaintiff has not shewn, that the defendant had notice of the execution of the said conveyance; which ought to have been done, because the defendant was to pay the money upon the execution of it at Sir *Francis Child's* house, and therefore the conveyance ought to have been executed there; and in this case it was executed in *Bucks* forty miles distant, and therefore it was impossible, that the defendant could pay the money upon the execution at *London* at the house of Sir *Francis Child*. But admitting that it might have been executed at another place, the defendant should have had notice of it, or reasonable and sufficient time before the money was to be paid, which was payable the seventeenth of *November*, and the conveyance was executed the sixteenth, and perhaps the last instant of the day, upon which instant the money was payable at another place forty miles distant, by which it was impossible for the defendant to perform his covenant. 3. It does not appear, that *Markham* was all the persons that claimed under the plaintiff, nor that all the estates that he and all persons have under him, passed by this lease and release. 4. Notice is said to be given to the defendant at *A.* of the execution of the conveyance there, but that notice is not good, for the defendant is not bound to go thither to accept it, to pay his money there upon the conveyance executed, which by the covenant ought to be paid at *London*.

But *Gould* King's serjeant argued, that the court in this case ought to judge, whether the bargain, &c. by lease and release be a good conveyance or not. And it seemed to him, that it is a good conveyance. But he admitted, that if lessee for years and the reversioner join in a lease and release, this does not operate by the statute of uses: for the lease being the lease of the lessee, who has no seisin of the freehold in the land, but only a possession of it, is not within the statute of uses; and then no possession by this lease is transferred before an actual entry, upon which the release may operate; but no entry appears to be in this case. But though in this case it is not good by bargain and sale by the statute of uses, yet the lessee and the reversioner joining together, who have the whole interest and estate of the land in them, this will be a good conveyance to pass the estate. For the lease ought to operate, *ut res magis valeat*, &c. and then in this case the lease ought to be expounded the surrender of the lessee to the reversioner, and then the lease and release of the reversioner. Or otherwise it will be a grant of the reversion, and then the grant of the interest of the lessee for years. For the intent of the parties was, that both their

interests should pass; and they have power to do it, and therefore it ought to be expounded a good grant to satisfy their intention. If the reversioner makes a lease for years of his reversion, the lessee in possession, though he has a greater term than the lessee of the reversion has, yet he may surrender to the lessee in reversion. 3 *Cro.* 302. *Co. Li.* 192. and nevertheless the term for years in possession cannot merge in the term in reversion, but is merged in the inheritance. *Hutt.* 126. and *Treport's case* 6 *Co.* 14. are authorities in point, that in this case it ought to operate as the grant of the reversioner and the surrender of the lessee; for the word surrender is not absolutely necessary to make a surrender. 40 *Affis.* 16. 2 *Roll.* 416. *Co. Li.* 301. b. 339. For the intent of the parties is sufficient to make a deed operate as a surrender, without any formal words. But if it cannot in this case operate as a surrender, yet since the lessee joins in the lease and release, it will be an extinguishment of his term. 3 *Cro.* 487. 10 *Co.* 46. *Lampet's case.* 2 *Roll.* 402. For a term of years being only a chattel interest, it will be easily extinguished. And though it was in this case designed by the parties, that it should be a lease, and then a release, to make the conveyance; yet the law in divers cases will make a transposition of estates, to satisfy the general intent of the parties, that it should not be frustrated. 1 *Co.* 76. *Bredon's case.* 3 *Cro.* 727, 792. *Plowd.* 172. *Jones* 455. which ought to be done in this case, rather than that it should be void. To the other exceptions taken to the declaration; as to the first, the plaintiff ought to make a conveyance before the seventeenth of *November*, and the defendant ought to pay the money at Sir *Francis Child's* in *London*; but he is not obliged by the covenant, to pay it before the seventeenth, and therefore he ought to have reasonable time to pay it after the conveyance executed. *Co. Li.* 211. *Keilw.* 75. 5. And *per Powell* justice, and *Treby* chief justice, although the money be to be paid at the house of Sir *Francis Child* upon the conveyance executed, yet that has no need to be executed there, but the money is to be paid there in reasonable time after the conveyance executed; for the conveyance might be by fine or recovery, which cannot be there. And it is not necessary, that the money be paid instantly upon the conveyance executed, nor before the seventeenth of *November*; but the defendant ought to have given notice to the plaintiff after the conveyance executed, at what time he would have paid the money. And as to the exception, that it does not appear, that *Markham* was all the persons, who have estate under the plaintiff; it shall not be intended, unless it be shewed by the other party. In this case it cannot be a bargain and sale within the statute of uses, for a termor is not within the said statute; but the question is here, whether this be not a good conveyance. The books have gone a good way, in transposing grants and

Time to perform a covenant.

Termor cannot bargain and sell.

Lessor and lessee make a bargain and sale for a year.

and words of the parties, to make them agree with their intents, that they should not be void. And in this case doubtless this might be a good conveyance, the one way or the other, to pass the interest of the parties. But *per Treby* chief justice, it is a doubt to him, whether the plaintiff should not have pleaded the conveyance according to its operation; but in this case having pleaded it as a bargain and sale, where it cannot be a bargain and sale; the declaration is not good. But *per Powell* justice the question is, whether this is not sufficient within the declaration, to shew that the plaintiff has performed all on his part, to intitle himself to his action; and therefore it may differ from the matter of a title pleaded. And (by him) in this case the termor has consented to pass his term, which will amount to a surrender. *Dier* 110. b. 3 *Cro.* 21. Lessee for years released to the reversioner, and held a good surrender. *Treby* chief justice doubted of the case in *Dier*. But if it be law, yet if the declaration in the said case had been, that the lessee released to the reversioner, where there was not any release, but a surrender, such declaration had not been good; but he ought to have declared that he had surrendered. But if in this case the deed of conveyance had been shewn *in haec verba*, there the court might have judged according to its operation. But here the deed is not shewn, but only it is said what is the effect, *viz.* that it is a bargain, &c. which it cannot be in this case. And if judgment be given for the plaintiff, it must be, that the lessee for years bargained, which cannot be, &c. for there is nothing before the court to make another construction. Whereupon it was directed to be argued again upon this point. And at another day it was argued by *Lutwyche* serjeant for the defendant, that the declaration is not good. But it ought to have been shewn what conveyance he had made to the defendant; for without a good conveyance the plaintiff is not intitled to his action; And it appears, that there cannot be any such conveyance, as he has shewn; and the court must take the case as it appears upon the declaration; and every one ought to declare upon the truth of his case, according to the operation of the law. 2 *Saund.* 97. *Noy* 66. 5 *Hen.* 7. 1. 2 *Ventr.* 149, 266. And in this case the defendant is liable to a penalty, and therefore it ought to be strictly taken. And he took other exceptions to the declaration, against which it was argued by *Gould* King's serjeant. And he admitted, that pleas in bar, which were to answer particular matter, ought to be pleaded agreeably to the operation of law. And therefore between *Besly* and *Witke*, *Hil.* 5 *Will.* & *Mar.* C. B. *Rot.* 1839. in *indebitatus assumpsit* the defendant pleaded a letter of licence, to take so much by the pound; and that he and the plaintiff have accounted together, and that he was indebted so much to him, which by the said agreement was so much, which he has tendered,

A man ought to plead according to the operation of law.

Besly v. Witke, or Battly v. Wash.

tendered, &c. and upon demurrer it was adjudged ill, inasmuch as the defendant ought to have pleaded it as a release. In the same manner in trespass a licence ought to be pleaded as a lease. But where the matter is only inducement, as in this case it is only inducement to the assignment of the breach, there such exactness is not requisite. 22 Edw. 4. 40. Hob. 107. Latch 95. Washington's case there cited. Powell justice, The point ordered to be argued was only upon the pleading, whether the lessee joining in this case with the reversioner, amounting to a surrender, ought to have been pleaded as a surrender. And (by him) in this case it need not, &c. If a man pleads by the words *dedit concessit et confirmavit*, it is not ill, inasmuch as the party has not taken upon him, to shew, in which of the ways the deed operates, but only it is a double plea. There is not here an express surrender by reason of the words in the deed, and therefore it seemed to him, that the plaintiff could not have declared better than by shewing the special matter. But by Treby chief justice the joining of the lessee with the lessor amounts to a surrender, and therefore the plaintiff might have pleaded it as a surrender. In this case the plaintiff does not recite the deed *in haec verba*, nor the substance and effect of it, but only that he made a deed of bargain and sale, by which bargain and sale, &c. and therefore the plaintiff took upon him, to shew to the court the effect and operation of the deed which the defendant refused, that it appears that the deed by law could not have any such operation, and the deed itself is not before the court, upon which they might adjudge, that it had any other operation, for no words of the deed are recited, but only that the lessee bargained and sold, &c. By this the joining in the deed by the lessee is only evidence of his consent, which ought to be adjudged by the deed, what effect such consent hath. Blencowe justice, If two tenants in common join in a lease, if this be pleaded as their joint lease, it is ill; and though it appears to the court that it has its operation as several leases, yet the party not having pleaded it so, the court will not adjudge it against the party's plea; which does not differ from this case. Treby chief justice, The plaintiff should have said, that the lessee surrendered, and that the reversioner bargained, &c. or if he had said that he had sufficiently conveyed, it had been sufficient. *Adjournatur.* Mr. Place.

And afterwards by the opinion of the whole court judgment was given for the defendant, because the plaintiff did not plead according to the operation of law. *Ex relatione m'ri Lutwyche.*

Redding *vers.* Lion.

REplevin. The defendant made conuſance as bailiff to B. for Bailiff tra-
rent, &c. The plaintiff replies, and traverses, that the de-^{verſed.}
fendant was bailiff to B. And iſſue thereupon, and verdict for ^{3 Lev. 20.}
the ^{12 Mod. 321.} And now motion was made for a repleader. But
denied *per curiam*, for though this is not traversable, and it had
been ill upon demurrer; yet after verdict it is good, and is not ſuch
an immaterial iſſue, as to cauſe the granting of a repleader. See
Hob. 113. Mr. Daly.

Gerrard *vers.* Arnold.

Judgment againſt three. Two bring error. The record was Execution ſu-
transmitted. Though in law the record is not removed, be-^{perſeded by}
cauſe all did not join, yet the execution is ſuperſeded. And there-^{bringing an}
fore in this caſe the other party being taken in execution, and of error.
having paid the money, to redeem his body, reſtitution was award-
ed. See *Stile* 105. 1 *Keb.* 12. Mr. Daly.

Weekly *vers.* Wildman.

CASE. The plaintiff declares, that he was occupier of a
houſe for ten years in D. and that for the time aforeſaid
there was a cuſtom within the town of D. that all inhabitants and
occupiers of houſes within the ſaid town ought to have common
for all commonable cattle in a ſen called *Deeping ſen*; and that
the plaintiff by reaſon thereof ought to have his common, &c. and
that the defendant had erected an engine, by which he caſt the
water upon the ſaid ſen, more than could be carried off by the
drains of the ſaid ſen, whereby the ſaid ſen was drowned; ſo that
the plaintiff could not enjoy his common in ſo full and beneficial
a manner as he ought, &c. The defendant demurs. This caſe
was brought two or three terms before in this court, and then the
plaintiff declared upon a preſcription for all the inhabitants to Preſcription
have common, &c. And it was held, that a preſcription for an ^{for an inhabi-}
inhabitant or occupier was not good; and therefore the plaintiff ^{tant or occu-}
brought this action, and declared upon a cuſtom. And it was ar- ^{pier.}
gued by *Levinz* ſerjeant for the defendant, that the plaintiff has ^{3 Lev. 160.}
declared, that he was poſſeſſed of a houſe for ten years, and that ^{Co. Copyh.}
for all the time aforeſaid he hath been uſed to have common, &c. ^{ſ. 33.}
which is not good, for all the time aforeſaid refers to the cuſtom;
5 L that

that it is impossible, that the plaintiff has used to have common for time immemorial. And as to the substance of the declaration, it is grounded upon a custom, for inhabitants to have common; which is not good by prescription, and for the same reason cannot be good by custom; for in this case it is a common in gross without number or stint. Occupiers may prescribe for an easement, not for an interest. 1 Cro. 418. In Co. Lit. and Bro. common 49. mention is made of a common in gross *sans nombre*; but by other books, as 22 Affise 36. 15 Ed. 4. 29. b. 1 Roll. Abr. 398. 22 Hen. 6. 36. 1 Saund. 143. it is proved, that in an action for such common it ought to be ascertained by levancy and couchancy upon some land; and therefore in the case in *Saunders* the action was not good for want of levant and couchant; and a new action was brought, where it was ascertained by levancy and couchancy, and for that it was held good. If such a custom, as is in this case, were good, there could be no improvement against the commoners; or if an inhabitant purchased parcel of the land, out of which the common issues, the next inhabitant would not be bound by this, but would have common *sans nombre*, and therefore there could not be any apportionment. Wright King's serjeant for the plaintiff. To the first exception: the declaration is, that time whereof, &c. there has been a custom, &c. and then that the plaintiff has been possessed for ten years, and that *per totum tempus praedictum* he hath used to have common. This relates to the ten years, and not to the custom. Of which opinion was the whole court. Then as to the custom, 6 Co. 59. *Gateward's* case, and 2 Cro. 152. seem to be against it, but notwithstanding these cases the custom is good. The defendant by his demurrer admits such a custom. And then being a custom the court will not adjudge it void, if by any reason it can be supposed to have had a reasonable commencement and continuance. A thing may be good by custom, which is not good by prescription; as a custom *in non decimando*, &c. This custom is not unreasonable, for common in gross *sans nombre* may be granted at this day; and whatsoever thing may be good in a grant, will be good in a custom. Co. Li. 122. 1 Roll. Abr. 398. 12 Hen. 8. 2. 15 Edw. 4. 29. which is cited in *Gateward's* case, does not prove the reason of that judgment. In 7 Edw. 4. 26. 18 Edw. 4. 3. a difference appears between a custom and a prescription; for it is said there, that inhabitants cannot prescribe for common, but they may have it by custom; for prescription is in the person, and therefore occupiers and inhabitants not having any perdurable estate, cannot prescribe; but a custom being fixed to the land, all the occupiers and possessors may have advantage of it. And as to the unreasonableness, although it is common *sans nombre*, yet it ought to be stinted with reason. As to *Mellor* and *Walker's* case, that was a prescription,

scription, and therefore levancy and couchancy was held necessary; but that reason does not hold, where the common is claimed by custom; for if any reasonable commencement can be presumed, the custom will be made good; and an act of parliament shall be intended for its original, rather than it shall be made void.

As to the first exception, *per curiam*, the *tempus praedictum* must relate to the ten years, not to the time of the custom, and therefore the declaration good notwithstanding that objection. And *per Powell* justice, the general stint of common is by levant and couchant, but a man may grant at this day common in gross *Common in sans nombre*. But this custom would not commence by grant, being in the inhabitants and occupiers, who are not capable to take by grant. This common cannot be extinguished or apportioned by purchase of part of the land, nor can the lord improve against such commoners. The reason given in *Gateward's* case cannot be answered against prescription and custom for occupiers to have common, though one should admit that the authorities cited there do not prove it. Copyholders may have customary common, their estates being also by custom, but their common may be extinguished.

Treby chief justice. It is agreed, that this common cannot be good by prescription; the question then is, if it be better by custom. In ancient time such grants might be, as to the inhabitants, &c. which were then allowed good, as the grant of the isle of *Wexham*, but such grants would not be good at this day. So in this case a grant of such a common to the inhabitants for encouragement of habitation in the fen country may be supposed, which ought to be adjudged good, if there had been constant enjoyment under such grant. See 2 *Keb.* 68. 3 *Keb.* 247. where such common is mentioned to be good by custom. But one ought not to presume any act of parliament in the case, for such presumption would make all unreasonable customs good; but these customs ought to appear of themselves to be reasonable, otherwise they will not be good; and therefore here the plaintiff should have suggested some particular reason to make the custom good, as for the better peopling of the fens, &c. for no reason appears in this record to maintain the custom, but the plaintiff should have shewn it; and it is not sufficient to say, that it may be reasonable, which might appear in evidence, but it ought to appear to the court.

Although a common *sans nombre* may be granted at this day, yet such grantee cannot grant it over. *Blencowe* justice. It will be very difficult to maintain this custom. The plaintiff might have declared of a levant and couchant, and a small evidence would have induced the jury to have found it, if it had been traversed.

Inhabitants

Inhabitants may have a custom to have pot water, which is an interest, and not barely an easement. But *Powell* justice denied that, and said that it is only an easement. And he agreed, that if any particular reason had been shewn, to support the custom, it might have been good. The court inclined against the custom. *Adjournatur.* Mr. Place.

Payment
pleaded to a
single bill
good after
verdict.
See now the
stat. 4 & 5
Ann. c. 16.
sec. 12.

IN debt upon a bond payable in 1668, payment made in 1689 was pleaded; and issue being joined upon it, verdict for the plaintiff. And the defendant moved for a repleader, because the issue was immaterial. But *per curiam*, the verdict being for the plaintiff, it is well enough. For if it had been paid in 68, it had not been unpaid in 89; and it is like *Nichols's* case, 5 Co. 43. But there the judges seem to be of opinion, that if the verdict had been for the defendant, it had been ill. And *per Powell* justice. If payment be pleaded to a single bill, it is good after verdict. *Ex relatione m^ri Daly.*

Beal *vers.* Simpson bailiff of the liberty of Pomfret.

S. C. Lutw.
627.

CASE for escape. The plaintiff declared as administrator to *J. S. durante minoritate* of *A.* which *A.* is yet within age, that *B.* being in the custody, &c. of the defendant, he permitted him to escape the third day of *February*. The defendant pleads, that the said *B.* being in his custody, a *habeas corpus* issued out of this court in *Hilary* term returnable in *Trinity* term; which *habeas corpus* being delivered to him before the escape, he by virtue thereof such a day before the return thereof took the said *B.* out of prison, and carried him to *Westminster*, and there delivered him in custody to the *Fleet*, &c. The plaintiff replies by protestation, that the said *habeas corpus* was not delivered to the defendant before the said *B.* was taken out of prison; and pleads, that a *habeas corpus* issued in *Michaelmas* term returnable the first day of *Hilary* term next following, but the defendant did not take the said *B.* out of prison by virtue of that writ; but after the return of the said writ the defendant without the plaintiff's knowledge took the said *B.* out of prison, and he being out of prison, the defendant by covin procured another writ of *habeas corpus* to be issued *teste* before, which issued out returnable in *Trinity* term; and by fraud, and by colour of that writ sued out by fraud, the defendant took the said *B.* out of prison; *absque hoc* that the said *B.* was taken out of prison *virtute* of the former writ. The defendant demurred. *Gould* serjeant argued, 1. That the declaration is not good, because the plaintiff declares as administrator *durante minoritate*

ritate of *A.* and says that *A.* is yet within age, but does not say that he is within the age of seventeen years, for at such age his administration ceases; and within age generally shall be intended the age of twenty one years, and then *A.* may be within the age of twenty one years, and get more than seventeen, and then the plaintiff has no authority. So that the plaintiff having only a particular authority for a certain time, he ought to shew that it is continuing; as tenant *pur auter vie* ought to shew that *cestuy que vie* is not dead. *Co. Li.* 41. And there is a difference between a plaintiff and the defendant, for the plaintiff ought to intitle himself by shewing particularly the age of the executor, where he sues in his right; but where an action is brought against such an executor, there the plaintiff has no need to shew it, because he is a stranger to the executor's age, but finding a man meddling in the administration is sufficient cause for him to bring his action against him. *2 Cro.* 110, 588. *Yelv.* 128. *Hob.* 251. *1 Cro.* 602. *5 Co.* 29. *Pigott's case.* 2. The traverse is not good, it being that the defendant did not take the said *B.* out of prison *virtute brevis praedicti*, for it is a negative pregnant. *Anger v. Hutton, Pasch.* 18 *Car.* 2. *B. R. rot.* 316. *2 Cro.* 87. But in this case there should not have been any traverse, because the plaintiff had confessed and avoided the first writ, and then he ought not to take a traverse to it. The defendant in this case is not estopped by the *teste* of the writ, but might have shewn that it was sued after the time of the *teste* of it. And the plaintiff in this case should have relied upon the fraud, for by this traverse he has tied the defendant to join in it, and has not given him any opportunity to answer, and shew the special matter, when the writ was first sued out. *Wyott* serjeant for the plaintiff argued *e contra.*

Powell justice. The difference where the plaintiffs or defendants are strangers to the executor within age as to the shewing of the executors age is grounded upon great reason; because privies ought to shew their authority, but strangers to it cannot. *2 Roll. Abr.* 466. And for this reason the plaintiff in this case being privy to the executor within age, ought to shew his age; and if he does shew it, and does not aver it sufficiently, it is not good upon demurrer, and it is not aided by verdict here. But the question is in this case, whether the defendant has not aided this defect by pleading over other matter, and not relying upon this deficiency of the declaration; for he has admitted by his plea, that the plaintiff is a person able to bring the action. *2 Cro.* 240. *Yelv.* 128. In *Pigot's case* the defendant pleaded a plea as in this case, but there was an ill averment there, that the executor was not twenty one; and an ill averment is worse than the omission of an averment, or an uncertain averment. *Brownl.* 247, 8. And for this reason he took it, that

An action brought by executor during the minority of *J. S.* there ought to be an averment that *J. S.* is not of the age of 17. *Contra*, where the action is brought against such executor. But the omission is aided by pleading over. *Post.* 486. *Ante* 212.

though there were no averment in this case, yet the defendant's plea would have aided it. And as to the traverse, he thought that the *virtute cujus* is traversable. 41 *Edw.* 3. 21. 11 *Co.* 10. When a matter of law is only comprised in the *virtute cujus*, then it is not traversable. *Plowd.* 430. But matter of fact in the *virtute cujus* is traversable, 9 *Hen.* 6. 20. and admitted in *Foster* and *Jackson's* case, in *Hob.* 52. which in probability would not have been admitted there, the case being so greatly debated, if it had been thought material. And in 1 *Saund.* 20. it is the opinion of *Saunders*, that *virtute cujus* is traversable. It is not any negative pregnant, because all is admitted, but only the taking out of prison by virtue of the writ.

Treby chief justice. As to the first exception, he agreed the difference between a stranger and a privy to the executor, 2 *Sid.* 60. and it is a defect, which is not aided but by verdict. 1 *Cro.* 240. *Yelv.* 101. And under age shall be intended under the age of twenty-one. 1 *Roll. Rep.* 400. But the defendant by pleading over has taken away this intendment, having by his plea admitted him able to maintain the action. And by this reason only the declaration is made good, where at the beginning of itself it was not good. As to the traverse, he thought it to be ill, because *virtute cujus* is not traversable. After demurrer it is ill, but it is good after verdict; which is an answer to *Foster* and *Jackson's* case, for the said case being after verdict, was aided, as all perplexed and improper issues are. But in this case there is a special demurrer, and cause shewn that the traverse is not good, but contains double matter, &c. And this traverse would be intricate, and contain multiplicity of matter, viz. of fact, and of law; and for that reason it could not be put in issue, to be tried by the jury, which was his chief reason against it. For *virtute* of such a writ is only that which the law says and expounds upon the writ. 1 *Saund.* 298. As if a writ be delivered to the sheriff, where the party is in his custody, it is matter of law, whether the party be in custody by virtue of that writ, by the delivery of it. But whether there was any such writ or no, or whether it was delivered or not, is matter of fact. And after such fact agreed in the affirmative, then is the matter of law, whether the party was in custody *virtute* of it, 2 *Co.* 48. and 11 *Co.* 10. There the matter was not traversable, inasmuch as it was mere matter of law, and nothing of fact in the case. And if *virtute cujus* be traversable, then the pleading of the statute of uses, that *virtute cujus* a man was possessed or seised may be traversed, which is a mere effect of the law. 3 *Cro.* 328. *Hob.* and 1 *Saund.* 20. are only cases where the point passed *sub silentio*. But 1 *Saund.* 298. is a judgment in point. A *per quod* is not traversable, and there is no difference between *per quod* and *virtute cujus*.

2 *Keb.* 607.

cujus. In this case the traverse ought to have been upon the delivery of the *babeas corpus*. And as to what was said by Gould, that the defendant ought to have had an opportunity to shew that the writ of *babeas corpus* issued out at another day after the *teste* of it, he did not know that it was ever resolved that it was averrable, that a writ issued out contrary to the *teste* of it; though it has been oftentimes attempted and disputed.

Gould serjeant. There is a difference between writs which are to punish wrongs, and those which are in advancement of right. Also a man cannot say, *quod breve emanavit* at another day, contrary to the *teste* of it; but *prosecutus fuit* the writ not before another day, may be pleaded. *Hutt. 20. Hob. 244. 2 Roll. Abr. 576.* Treby chief justice, Admit that one may say, *quod prosecutus fuit* a writ at another day than it bears *teste*, but not that the writ *emanavit* at another day; in this case the traverse ought to have been, that the party was taken out of the prison before the writ delivered to him.

Powell justice. But then it may be a question, whether the sheriff cannot justify after the *teste* of a writ, before it be delivered to him? And Levinz serjeant, who was not in the cause, said that it was adjudged that he might justify before the writ delivered to him. But Treby chief justice denied that, and 1 Saund. 120. agrees.

At another day in this term the judges gave judgment in this case.

Powell justice. The time of the issuing of the writ is traversable. There is no confessing and avoiding of the writ mentioned in the plea; for the plaintiff shews, that there was no such writ, but another writ sued out after it. He might in this case have traversed the delivery of the writ, that being alleged by the defendant; but he has not traversed it, but the taking out of prison *virtute* of the writ; and there being two things alleged, which were traversable, it was at the plaintiff's election to traverse the one or the other. He confessed, that generally the *virtute* of a writ is matter and inference of law only, and then not traversable; but matter of fact may depend upon it, and then it is traversable; as in this case the taking out of prison, and for that reason it is here traversable. And in some cases it may be, that nothing but only the *virtute* of the writ is to be traversed; as if two writs be delivered to the sheriff against *A.* one at the suit of *B.* returnable the first return of Hilary term, and the other at the suit of *D.* returnable the last return of the said term; and *D.* procures a warrant upon his writ, upon which *A.* is arrested after the return of the writ of *B.* and then gives a bail-bond for his appearance; and in a suit upon this bail-bond

Time of issuing of a writ traversable.

Virtute of a writ traversed.

bond *A.* pleads that he was arrested upon the writ of *B.* returnable the first return of the term, and that he gave the said bail-bond after the return of the said writ, by which it is void by the 23 *Hen. 6. cap. 10.* the sheriff replies, that there was another writ at the suit of *D.* returnable the last return of the said term, and that *A.* was arrested, and the bail-bond given, upon that writ; he ought to traverse, *absque hoc* that he was arrested *virtute* of the writ of *B.* and no other thing is traversable there; and if it be not traversed, the bail-bond will be made void, where it was rightly taken, which is not reason. 3 *Keb. 260. Rod v. Huans.*

Treby chief justice *contra.* The *virtute cujus* is not traversable in any case, and that is resolved, 1 *Saund. 298.* and he himself has a report of the said case, which agrees with the said book, that it was held by the court there, that *virtute cujus* is not traversable. When one says, such a thing was done *virtute* of a writ, it is meant by authority of the said writ, by an operation of the law upon the said writ, without any ingredient or mixture of matter of fact; and a mere matter of law is not to be traversed, and tried by a jury. *Foster and Jackson's* case, in *Hobart 52.* is no authority in this case, being upon an issue tried; for if issue be taken thereupon, it is not void, but good after verdict. The question in this case is, whether the party be bound to take such an issue, that being before the court to be adjudged upon a demurrer, and in this case upon a special demurrer; and for that reason in this case he has saved to himself by the demurrer all the advantages, which might be taken to it. And the forms of pleading ought to be preserved by us by all means, that being the chief reason of the preserving the law so well until our time. The words *virtute cujus, per quod, praetextu* or *vigore cujus*, introduce a consequence of law only, from the matters of fact before stated. *Heath's maxims of pleading 165. 7 Hen. 7. 3, 4.* which is cited and allowed, *Plowd. 54, 193. Dier 185. b.* where it is agreed, that the *virtute cujus* never introduces any new matter, but only collects the matter before. And if it be so, being the conclusion only, it ought not to be traversed, but the matters precedent, upon which it depends, which are proper matters of fact, and the *virtute* the conclusion of the law from such facts. 7 *Hen. 6. 5, 6, 7. accord.* The case 9 *Hen. 6. 20.* cited, does not resemble this case; for it is not said there, that he was in execution *virtute, &c.* but that he was committed in execution; and the commitment is proper matter of fact to be tried, whether there was such commitment or not. And the same case is 12 *Hen. 6. 2, 3.* where it appears the commitment was of fact, and there was an issue there joined; and, as has been said before, if issue be joined, it is good. That a man was seised *vigore* of the statute of uses, will not be a good traverse upon demurrer, yet after verdict such an issue would be good. In this

this case upon this traverse, what is the matter to be tried? Whether any writ issued? or whether the said *A.* was taken out of prison? But all this was alleged before the *virtute cujus*. Or rather all the matters upon this traverse should be tried; and then the traverse is ill, containing multiplicity of matters of fact; but the point of law upon this is a single point. Suppose a person in the custody of the sheriff, and another writ is delivered to him, and the sheriff upon delivery of it declares that he will not execute it, and the person escapes, upon which he who delivered the second writ brings an action upon the escape, and the sheriff pleads that he was not in his custody *virtute* of the second writ to him delivered; in this case if the law be only tried by this traverse, doubtless the party was in custody by delivery of the second writ, he being in his custody before by another writ; but the matter of fact is contrary, for he declared absolutely that he would not execute it; and by this it appears, that the law, and not the fact, is to be tried upon this issue. *Nevill* and *Blencowe* justices agreed with *Powell* justice, that generally the *virtute cujus* is not to be traversed, containing matter of law; but when it is mixed with fact there it may be traversed. And in this case there is matter of fact which depends upon it, and for that reason it is traversable. And there may be some cases, as the case of the bail-bond, where nothing but the *virtute cujus* is traversable, as put before by *Powell* justice. To the other matter the whole court agreed, that the advantage of the exception, for not averring that the executor was within the age of seventeen, was waived by pleading over. And judgment was given for the plaintiff.

Hilary Term

10 Will. 3. B. R.

Sir John Holt Chief Justice.

Sir Thomas Rokeby

Sir John Turton

*Sir Henry Gould knight, King's
serjeant, this term was made } Justices.
a justice in the King's Bench
in the room of Sir Samuel
Eyre deceased,*

Memorandum, *This term Mr. serjeant Darnall was
made King's serjeant in the room of Mr. serjeant
Gould made justice of the King's Bench.*

Rex *vers.* Beare.

S. C. 2 Salk.
417, 646.
Carth. 407.
12 Mod. 219.
Indictment
for a libel.

THE defendant *Beare* was indicted at *Exeter* in *Devonshire*, for that, that he 7 *Will.* 3. at *B.* in *Devon* composed, made, wrote, and industriously collected, many false and scandalous libels; *in uno quorum continetur inter alia juxta tenorem et ad effectum sequentem, viz.* and then shews the words of the libel, &c. Which indictment being removed by *certiorari* into the King's Bench, the defendant pleaded not guilty. And being brought to trial at the assizes at *Exeter*, it was tried before *Nevill* justice of the Common Pleas, and *Rokeby* justice of the King's Bench, then justices of assize, &c. And the jury, as to the writing and collecting of the said libels, find him guilty, *prout in indictamento superius supponitur*; and as to all other things charged

charged in the indictment, *praeter scripturam et collectionem*, they find him not guilty. This case depended in the King's Bench several terms, and was argued several times at the bar. And now this term it was argued solemnly on the bench by all the judges, viz. Holt chief justice, Rokeby and Turton justices. And all were of opinion, that judgment ought to be given for the King. The exceptions taken at the bar were as well to the indictment as to the verdict. To the indictment, because it is not sufficiently and certainly shewn, that the words contained in the indictment were the same with those in the libel. *Sed non allocatur*. For *per curiam*, the words [*juxta tenorem sequentem*] ascertain and satisfy the court, that these are the specifick words mentioned in the libel. For *juxta* is sometimes used as an adverb, sometimes as a preposition. It is used here as a preposition, as it is in all cases where it governs an accusative case. And where it is applied to a place, it signifies near to, or beside; where it is applied to a thing, it has the same signification as *secundum*, i. e. according to; and *secundum formam statuti*, &c. is always held well enough. *Plow. 285. b. 286. b. Juxta vim, &c. indenturae praedictae*, is well enough. *Co. Entr. 116.* Then *tenor* imports the specifick words. *Reg. 169. a. Tenor* is used in the same sense as *transcriptum*, and upon the *b* side of the leaf *tenor* and *transcriptum* are used indifferently for the same thing. Then if *tenor* signifies *transcriptum*, *tenor sequens* is as much as to say, that the words following are a true copy of the words in the libel; and therefore the jury could not have found the defendant guilty, if the words in the indictment, and those in the libel, had been different. In the case of *Ford v. Bennet intr.* *Ford v. Bennet.* *Hil. 34 & 35 Car. 2. B. R. Rot. 1154.* where in a special action upon the case there against *Bennett* and others the plaintiff declared, that the defendants at *Saltaſh* procured a false and scandalous libel against the plaintiff to be written in the form and under the colour of a petition; in which information, in form of a petition the libel *continetur ad tenorem et effectum sequentem*; two were found guilty upon not guilty pleaded, and five not guilty; upon which judgment was entred for the plaintiff; and afterwards upon a writ of error brought in the Exchequer chamber the judgment was affirmed, the exception being over-ruled without consideration. And *Holt* chief justice said, that he then thought the judgment to be given with too great precipitation, but he afterwards upon great consideration had esteemed the said resolution to be very good law. *Mich. 4 Will. & Mar. Rex v. Fuller*, and *Mich. 4 Will. & Mar. Rex v. Young*, were cited as authorities in point. And therefore the whole court were of opinion, that notwithstanding this exception the indictment was good, but if it had been only *ad effectum sequentem* it had been ill, because it had not imported that the words were the specifick words which were in the libel. *Ad effectum sequentem.*

The exceptions to the verdict were two, 1. That the defendant being found guilty only of the writing of a libel, and collecting of it, is not guilty of any offense. 2. That as this case is, the verdict amounts to an acquittal. And as to the first exception *Holt* chief justice said, that he did not regard the collecting of the libels, but he was of opinion, that the copying of a libel, by a man who is not contriver nor composer of it, is very criminal; and to prove this, he said, that he would consider, in what a libel consisted. And (by him) it is not the infamous matter or words which make the libel; for if a man speak such words, unless they are written, he is not guilty of the making of a libel, for the writing is essential to a libel; and therefore if *Beare* writes such matter he becomes a libeller, for it was not a libel before it was written. And in all cases where a man does the act, which act causes the thing to be that which it is; that man ought to be construed the doer of such a thing. This rule proves itself, as well in all the great offenses, as in all the least. If *A.* contrives treasonable matter, and *B.* writes the whole contrivance, *B.* is guilty as well as *A.* If an act of parliament makes *Sodomy* felony, and does not speak of abettors, and *B.* accompanies *A.* whilst he does the fact, and keeps the door, *B.* will be guilty of the felony as well as *A.* 3 *Inst.* 59. The same law in the lowest offenses, where all are principals. As if *A.* holds *B.* while *C.* beats *B.* *A.* is guilty of the battery. It would be very strange then, if in this case only, he who contributes so much to the doing of the thing (as he who writes does in this case of the libel) should be construed innocent.

Libel copied.

Writing is essential to a libel.

Objection. It is said 9 *Co.* 59. *b.* *Lamb's* case, that a libeller ought to be either the contriver, procurer, or publisher.

Publication.

Answer. That book ought to be expounded by *Moor* 813. where the writer of a libel is deemed in law to be the contriver; and then *Coke* may be admitted to be law, otherwise not; for in the case in *Coke* the question was of the publication of a libel; and it was held, that the writing of a copy of a libel was not a publication, but only evidence of it; but no question was made, if he was a libeller. And for the matter of publication, the having of a libel is not a publication. If a libel be publickly known to be published, the having of a copy is evidence of a publication; but *contra*, where it is not known to be published.

Objection. The writing of a libel may be lawful, as by the clerk who draws the indictment, or by a student who took notes of it, &c. Then *Beare* being found guilty of writing generally; for all that appears to the contrary, it may be a lawful writing.

Answ. Where the matter abstractedly considered is unlawful, there such a general verdict shall be taken to be criminal; and some special thing ought to be found to excuse the defendant. If an action be brought upon the statute for maintenance, it is sufficient to say *manutenuit*, though in some cases a man may lawfully maintain a suit, as an attorney or relation, &c. yet because it is unlawful *in abstracto*, such general allegation is well enough, and it shall be intended of unlawful maintenance within the statute. Besides, that it cannot here be intended of such writing; for if an officer of a court, or reporter, &c. copies a libel, such copy in writing is not a libel, because it is not done *ad infamiam* of the party, but only to bring the criminal to punishment. 3 *Inst.* 174. is a strong case, for there *John of Northampton* is charged with writing only, nor is any mention made of publication, but the writing only is confessed, but the court were tender in the punishment, because he was an attorney. And *Holt* chief justice said, that it was not necessary in this case to pronounce his opinion, whether the writing of a copy of a libel be the writing of a libel; for if it be not, then the jury having found the defendant guilty of writing a libel, he must be found guilty of writing of the original, and a copy could not have been given in evidence. *E contra*, if the copying of a libel be the making of a libel, then the writing of a copy is a great offense. But he said, that to the end that the audience might not maintain a notion, that the copying of a libel by a man who has no warrantable authority to do it is not libelling, he would observe; 1. That such copy contains all things necessary to the making of a libel, *viz.* the scandalous matter and the writing. 2. That it has the same consequence, for the writing makes the offense, because by this means it is perpetuated, and of necessity at some time will come into the hands of other men; and there is as much danger in the writing of a copy, as in the writing of the original; and for this reason being so advised, he said, that he was of opinion, that the writing of a copy of a libel is the writing of a libel. And if the law were otherwise it might be very dangerous, for then men might take copies with impunity; and for the same reason the printing of them would be no offense, and then farewell to all government. The defendant *Beare* has had great favour in the verdict, for when a libel is produced written by a man's own hand, and the author of it is not known; he is taken in the mainer, and that throws the proof upon him; and if he cannot produce the composer, the verdict will be against him. As to the second question upon the verdict, *viz.* whether this amounts to an acquittal, because the defendant being charged with the composing, writing, and making; and being found not guilty of the making, he is found not guilty of the writing also, because

The writing
of a libel.

Composing.

Libelling an
old offense.

the writing is the making; otherwise the verdict is repugnant. *Holt* chief justice said, that the making is a *genus*, and composing, contriving, and writing, are *species* of it. Then the finding that he is not guilty of all, except the writing, finds him not guilty of any *species* of making, except writing. And he said, that this notion of libelling is as old as the law. Libelling against a private man is a moral offense; but when it is against a government, it tends to the destruction of it. For the antiquity of this notion, see *Vinnius* 741. by the law of the twelve tables. And afterwards when the civil law was digested into a method by the emperor *Justinian* about the year 741. in his *Institutes lib. 4. tit. de injuriis 4.* where the writing of a libel is distinguished, and held to be an offense. And he said, that he cited this authority, because *Bracton, lib. 3. tit. coron. 135.* seems to have transferred the same sentence out of *Justinian*. And therefore (by him) judgment ought to be given for the King.

Collecting of
libels.

Verdict interpreted according to vulgar
acceptation.

Verdict repugnant.

Turton and *Rokeby* justices cited some cases, to prove, that the writing of a libel, without publishing, was punishable in the *Star-Chamber*, and by consequence now punishable by indictment. *Hob. 62, 215, 121. Poph. 139. 12 Co. 35.* And they said, that the defendant was found guilty, *prout per indictmentum praedictum supponitur*; which includes all the aggravating adverbs in the indictment, as *proditorie, &c.* And *Rokeby* justice, that it is a great offense to collect industriously such libels. And as to the finding of the verdict he said, that the verdict being the words of lay-people, ought to be understood according to the vulgar acceptation; and therefore though the writing in point of law is making, yet it was understood in common speech otherwise. And therefore if *A.* invents the matter, *B.* makes rhyme of it, and *C.* writes it, every one in common understanding may be distinguished by some special term, as *A.* the inventor, *B.* the poet, *C.* the writer, though the law denominates them all makers; and so the verdict will be free from repugnancy. 2. If the jury find, that *B.* did not make the libel, after which they find that which amounts to the making, that will be repugnant, and shall be rejected, for all that is inconsistent with what they have found before. *Hetley 4. Moor 431. Dier 372.* Judgment for the King. And *Beare* was fined 500 marks, and ordered to appear at the assizes at *Exeter* with a paper denoting his offense. But the last day of the term his fine was remitted to 100 marks.

Clayton

Clayton *vers.* Kinaſton.

Intr. Trin. 10 Will. 3. B. R. Rot. 246.

Clayton executor of Clayton executor of Wintershall brought S. C. 12 Mod. S. C. 2 Salk. 573. Defeasance. Post 688. Gibb. 55. covenant against Kinaſton; in which the plaintiff declared upon articles of agreement made the first of May 1676, between Killigrew, Kinaſton, and others, of the first part, and Wintershall of the other part, in which (*inter alia*) it was covenanted, that if Wintershall would quit the company of actors of comedies, and give notice thereof in writing three months before, or if Kinaſton and the others should declare him incapable of acting by note in writing under their hands; that after three months after such notice as aforesaid, or such declaration, Wintershall should be allowed by them, or others to be added to the company, 5*s.* *per diem* for every day of acting out of the profits of acting; and after his death 100*l.* should be paid to his executors within three months; and if Wintershall should die before such notice, &c. then his executors should have 100*l.* within six months after his death; provided that such notice should not be given, but in an acting week, and the three months to be compleat by acting weeks; and the plaintiff assigns for breach, that Wintershall died the seventh of June 1679, and the 100*l.* were not paid within the six months, nor at any time after. The defendant pleads, that at the same time there was another deed executed between Killigrew and Wintershall of the first part and Kinaſton of the second part, with the same agreement as in the other deed, and moreover, that after such notice given by Kinaſton, &c. as aforesaid, Kinaſton should be discharged from all debts, &c. and should be indemnified from all agreements or securities at any time before made or thereafter to be made for the use of the company; and the defendant avers, that he gave notice, and that three months elapsed before the death of the plaintiff's testator, *viz.* Wintershall, by which he became discharged, &c. and he pleads this by way of defeasance to Wintershall's deed. The plaintiff demurs. And the principal question was, whether this second deed could be a defeasance of the first. And it was argued for the plaintiff by Mr. Mountague, that it could not; and by Sir Bartholomew Shower and Mr. Northey for the defendant, that it might, for avoiding circuity of action. For the defendant Kinaſton being discharged by his notice given, &c. might have covenant against the executors of Wintershall upon the covenant that he should be indemnified, &c. and the *quantum* of the damages would be that which the executors have recovered against him in this action; and where the plaintiff shall not recover more

Circuity of action avoided.

Evidence upon *nil debet* pleaded in debt for rent.

Shower 46.

Cammell v. Edwards.
Release.

See 2 Ventr.
217. Gawden v. Draper.

Release to one obligor or co-ventor.

Ro. Abr. 412.
(G. a.) pl. 5.
4. Bro. Prærog. p. 124.
Lit. Rep. 191.
Co. Lit. 232.
Hob. 10.
Mo. 855.

more against the defendant, than the defendant upon his covenant against the plaintiff; there the law will construe such covenant to amount to a defeasance. And therefore where the lessor covenants to repair the house demised; the lessee in default of the lessor may repair, and in debt for the rent, upon *nil debet* pleaded, he may give in evidence what he has expended in reparations. 3 Cro. 222. 1 Leon. pl. 320. (But Holt chief justice said that he doubted that, unless it were part of the covenant, that the tenant should deduct.) And upon the same reason, Co. Lit. 265. the case of rebutter upon warranty is adjudged. And the difference is, where so much shall be recovered upon the plaintiff's covenant, as he recovers against the defendant; and where but part of it. And this is an answer to the cases in 1 Andersf. 307. and Moor pl. 80. And that difference is taken there as the foundation of those resolutions. And one deed may be defeasanced by another deed executed at the same time. 2 Saund. 47, 48. Co. Lit. 207. 3 Cro. 125. 21 Hen. 7. 23. 1 Roll. Abr. 590. And it has been adjudged in this court, Mich. 3 Will. & Mar. Intr. Trin. 3 Will. & Mar. Rot. 394. Scarvill or Cammell v. Edwards, that a covenant not to sue a bond will amount to a defeasance. See 3 Cro. 352. Noy 5. Moor 811. And to this point Holt chief justice this term delivered the opinion of the court, that the second deed could not be construed to be a defeasance in this case; because the two deeds, being made at the same time, shall not be construed to destroy themselves; but if Kinaston for desisting to act should be discharged of his covenant, the security of Wintershall would be much diminished, if it were not totally destroyed, for the joint remedy is altogether destroyed, and perhaps the several remedy also; for where two are jointly and severally bound in a bond, a release to the one discharges the other. But he said, that he would not give any opinion, how the law would be in such case in case of a covenant; but that the joint remedy is destroyed, is without doubt. And certainly it could never be the intent of the parties, that the deed should be void as soon as it was made. But if A. be bound to B. and then B. reciting the bond, covenants to save him harmless absolutely, or upon a contingency; this amounts to an absolute defeasance in the one case, and in the other case after the contingency happens. And it is so, for avoiding circuity of action. But here there is no relation between the deeds; and the words of the covenant are, to be discharged and saved harmless from agreements, &c. before made, or herereafter to be made; but no mention is made of the security at the same time given. Besides, that the intent of the parties was, that they should be mutual securities the one to the other, and therefore the one deed cannot be a defeasance of the other. Mr. Northey took exception to the declaration, because when the plaintiff comes to the deed, he says only, between Killigrew and

Edward Kinaston and others of the one part, and *Wintershall* of the other part, without saying *praedictum*; so that it does not appear, that it is the same party against whom the action is brought. *Praedictum* wanting. And he took a distinction, where the omission is in the charging part, as here (for if the defendant was not a party to the deed, then there is nothing for a foundation of the action) and where the defendant is once well charged, and afterwards such an omission follows, there it may be well enough. See *Yelv.* 103. 3 *Cro.* 913. But to this exception *Wright* King's serjeant answered, that *Edward Kinaston* in the deed must be intended the defendant, and the omission of *praedictum* has been over-ruled in many cases. 8 *Co.* 57. *a.* *Bridgm.* 99. *Dier* 70. *Hardr.* 178. And all the court was of opinion, that it was well enough, because it appeared sufficiently to be the same person. Another exception was taken to the plea, because it is not averred, that notice was given in an acting week according to the covenant; so that for all that appeared, the defendant was still of the company. But to this *Mr. Northey* answered, that since they came by way of *proviso*, it ought to be shewn on the other side, if they would take advantage of it; for the pleader has no need to shew more, than that which makes for his advantage. 5 *Co.* 78. *b.* 3 *Cro.* 405. 7 *Co.* 10. A difference between a condition precedent and subsequent; in the latter case one has no need to aver performance, *contra* in the former. *Poph.* 28. So in pleading of statutes the pleader shall plead only the enacting part; and if there is a *proviso*, which is for the advantage of the other party, he ought to shew it. *Plowd.* 376. *a.* 1 *Leon.* pl. 202. But the whole court held the plea incurable for this defect. For where the *proviso* is by way of defeasance, it ought to be pleaded by him that takes advantage of it; but here this alters the tenor of the covenant by tying it to another notice than the general words of the covenant would require; and therefore it is part of the covenant itself. Judgment for the plaintiff.

Hyleing *vers.* Hastings. Ante 389.

HOLT chief justice reported in the King's Bench, that he had put this case to all the judges of England (except *Lechmere*)^{54.} assembled at *Serjeants inn*; and that they were all of opinion, that this conditional promise had brought the case out of the statute of limitations, and that a general *indebitatus assumpsit* might be well maintained, because the defendant has waived the benefit of the statute. And it is as strong as an express promise, after the condition is performed, *viz.* the proof of the debt, which ought to be done in evidence upon the *indebitatus assumpsit*, 2. It was moved, whether

Bare acknow-
ledgment.

whether the acknowledgment of a debt within the six years would amount to a new promise, to bring it back out of the statute; and they all were of opinion, that it would not, but that it was evidence of a promise. And *Rokeby* justice compared it to the case of trover and conversion, where a demand and denial is held to be evidence of a conversion, but not a conversion. Judgment for the plaintiff.

Ward *vers.* Everet.

Intr. Hil. 7 Will. 3. B. R. Rot. 718.

S. C. 5 Mod.
25, 55.
Salk. 390.
Carth. 340.
Comb. 330.
12 Mod. 227.

Tenants in
common can-
not join in a
vowry.

See 3 Cro.
729.

REplevin. The defendant avows as, bailiff to *Carina* and *Elizabeth Cromwell*, for that, that *Sir Robert Carr* was seised in fee of the place where, &c. and being so seised, granted one annuity or annual rent of 100*l.* to *Carina*, *Elizabeth*, *Anne*, *Mary*, and *Hester Cromwell* for their lives and the life of the survivor, to be equally divided among them, *viz.* 20*l.* for each of them during their lives, and after that the first of them should die, that her part should be divided equally among the survivors; and then follows the same limitation, if the second and third should die; but when the deed comes to the two last, there is no limitation of survivorship between them; that *Carina* and *Elizabeth* were the two survivors; and for rent arrear, as bailiff to them, the defendant avows, &c. The plaintiff in bar of the avowry pleads, that by an act of parliament all conveyances made by *Sir Robert Carr* before *April 1630* were made void; and that this conveyance was such, &c. Upon issue joined upon this plea in bar, and trial at bar, the verdict was for the avowant. And serjeant *Pemberton* about three years before this time moved in arrest of judgment, that the avowry was ill; because by the grant the grantees were tenants in common of this rent, and therefore they could not join in avowry, but ought to avow severally. *Litt. sect.* 317. And upon this exception the matter was referred, and lay dormant for three years and more. And now this term Mr. *Mountague* argued for the avowant, that this was a jointenancy. For it is a grant of an annuity of 100*l.* to five, which is joint by operation of law; and the clause, to be equally divided, will not make it a tenancy in common in a deed, otherwise in a will. 2 *Roll. Abr.* 90. *Sti.* 211. See *Co. Li.* 180. *b.* *Cro. Car.* 74. *Dier* 361. 3 *Cra.* 25. 1 *Saund.* 282.

Per Holt chief justice. This seems to be a strong case of a jointenancy: For when *Sir Robert Carr* has granted an annuity to five, the

the words, equally to be divided, will not make a tenancy in common in a deed; and the limitation of 20l. apiece is only by way of distribution, not severing the grant. And this is like the case of *Knight, 5 Co. 55.* where it is held, that the rent issued out of the whole, and the [*viz.* 10s. for the one, &c.] was only an indication of the several values and rates of the lands demised. For when the grantor has granted one rent, it is repugnant to the words of the grant to make it several grants of several rents. As if *A.* should grant two acres to *B.* and *C.* *viz.* the one to *B.* and the other to *C.* the [*viz.*] is repugnant. See *Hob. 172.* And *Holt* said, that this case cannot be distinguished from the case in *Co. Li. 169. b.* where one coparcener grants a rent of 20s. for equality of partition to the other two, *viz.* ten shillings to the one, and ten shillings to the other; they have but one rent, and the [*viz.*] is only explanatory. Then the limitation of 20l. cannot make a tenancy in common here, for tenant in common ought to avow *de quinta parte centum librarum*, and not for 20l. Judgment for the defendant by the whole court. See *Dier 308, 9. Winter's case.*

Coxeter *vers.* Parsons.

DR. *Parsons* libelled in the spiritual court against *Coxeter*, for having said of him, that *Parsons* had no sense, was a dunce and a blockhead, and he wondered that the bishop would lay his hands upon such a fellow, and that he deserved to have his gown pulled over his ears. Upon a rule to shew cause why a prohibition should not be granted, Sir *Bartholomew Shower* cited 2 *Roll. Abr.* 295, 7. Prohibition denied to a suit for calling a parson knave. 2. That by the 13 *Eliz. cap. 12.* he is liable to be deprived for being unlearned. To the first, *Holt* chief justice said, that a consultation was denied in this court, in a case where a prohibition was granted to a suit for calling a parson knave, upon demurrer to the declaration upon the prohibition, between *Nelson* and *Hawkins, Mich. 8. and Hill. 8 Will. 3. B. R.* For it imports nothing of spiritual defamation; for a parson may be a knave or a blockhead, as well as another man; and no punishment is inflicted upon parsons in the spiritual court, for being ignorant or knavish. And he cited a case in this court between *Bill* and *Field*, where *A.* speaking to *B.* of *C.* (who was absent, and was gone to be made a justice of peace) said, *C.* will make such a justice as Major *Bill*, who is a fool, and an ass, and a blockhead, and a baffle-headed justice; in an action brought by *Bill* for speaking these words, after verdict for the plaintiff, upon not guilty pleaded, judgment was arrested. And as to the second, *Holt* said, if that was as Sir *Bartholomew Shower* urged, then it was a temporal damage; and for that he

Equally to be divided, in a deed.

viz. explanatory.

S. C. 2 Salk. 692.
S. C. 12 Mod. 237.
Ante 212, 397.
Words spoken of a parson.

Nelson v. Hawkins.
Cases in B. R. 104.
Holt 593.

Bill v. Field,
1 Lev. 52.

Temporal
shall lose.

shall have an action, and cannot sue in the spiritual court. Prohibition was granted.

Rex vers. Fell.

S. C. 1 Salk.
272, 287.
5 Mod. 414.
Indictment a-
gainst a gaoler
for an escape.
3 Cro. 894.
2 Inst. 590.
1 Ro. Abr.
806, 809.
2 Mod. 30.
Di. 66.
13 Cro. Jac.
588. pl. 11.

Error in the
commitment
will not excuse
the gaoler for
an escape.

Gaoler liable
to escape,
though the
commitment
was to the
sheriff.
The sheriff
punishable
criminally for
escape suffered
by the gaoler.

FELL keeper of *Newgate* was indicted for the escape of *Berkinhead*, who was committed for high treason in conspiring the death of the King. Upon not guilty pleaded, verdict for the King. And now Sir *Bartholomew Shower* and Mr. *Northey* moved in arrest of judgment, that it was said only that *Fell* suffered *Berkinhead* to escape, being in his custody *oneratum pro alta proditione*, &c. and does not shew, that he was committed for high treason to the custody of the defendant. And for this exception judgment was arrested. For *per Holt* chief justice, if a man be in custody of *Fell* for a trespass, and another person goes before a justice of peace, and swears high treason against him, he will be in custody of *Fell*, and also charged with high treason; but yet since he was not committed to *Fell* for high treason, *Fell* shall not answer for his escape, as the escape of a man committed for high treason. The precedents are, *cujus ex causa commissus fuit*. And in the case for the escape of the lord *Grey* the *mittimus* was set out; and though error in the commitment will not excuse the gaoler (as if a man be committed for high treason, there to continue until farther order) if he permits the man committed to escape, yet the gaoler shall never be charged for the escape of the man, as committed for an offense, for which he never was committed to him. And he reprehended the King's council, for not following the ancient precedents. Another exception was, that it was said, *Berkinhead* was committed *prisonae de Newgate sub custodia vicecom.* so that it did not appear that he was committed to the custody of *Fell*; and also to say, that he was committed *prisonae*, &c. was insensible, because a man cannot be committed to a place, but to a person, &c. To the first point they held, that this was well enough. For if *Berkinhead* was committed to the sheriff, and the gaoler permits him to escape, the gaoler is liable; for the prisoner is in the custody of both. And though some scruple has been made, whether the sheriff be in such case chargeable [See *Hale P. C.* 114. The sheriff shall not be charged criminally, *viz.* to extend to life or limb; though he is liable to payment of damages in escape for civil cause] without doubt he is. For by 14 *Edw. 3. cap. 10.* the sheriff ought to put in such a gaoler, as for whom he will be answerable; and 19 *Hen. 7. cap. 10.* which restores the gaols to the sheriff, says, that in all cases where the gaol belongs to the sheriff, he shall be chargeable for escapes. And *Holt* said, that he made mention of it for the good of sheriffs, and not to cause examination of what is past. And as to the second part,

point, *Holt* chief justice said, that it was according to the precedents; for commitments *prisonae et turri London* are frequent, and such commitment is a good commitment to the lieutenant of the Tower. 3. A third exception was, that it did not appear (admitting *Berkinhead* to have been committed to the prison for high treason) that he was under such commitment at the time of the escape; for it may be he was pardoned, &c. But this was overruled; for *Holt* chief justice held, that that ought to come of the other side. And if a man was pardoned, yet the sheriff ought not to take notice of it, until his pardon was allowed in the King's Bench, or some other court; for the sheriff cannot allow the King's pardon; and it is criminal in him to permit a prisoner to escape, before such allowance had.

Rex v. inhabitantes de Rislip. Ante 394.

THIS case being now debated, *Holt* chief justice and *Gould* justice were of opinion, that *Rislip* was concluded. And *Gould* justice said, that *Harrow* being first possessed of *Edlin*, and removing him to *Rislip* as the place of his last legal settlement, from which order *Rislip* appealed, and the order was confirmed upon that appeal, *Rislip* is concluded from contesting that it was the place of his last legal settlement; because *Rislip* upon the appeal had the advantage of that matter; for if *Rislip* could have shewn that there was another place, where *Edlin* was lawfully last settled, *Edlin* ought to have been sent back to *Harrow*, for then he was not well removed to *Rislip*, the place which was possessed of him being obliged to maintain him, until they can find where he was last legally settled. *Rokeby* justice was of opinion, that the appeal to the sessions was not final in any case, but it might be removed into the King's Bench, and examined there upon the merits. *Turton* justice was of opinion, that *Rislip* should be concluded against *Harrow*, but not against *Hendon*, because *Hendon* was not party to the suit. The court being divided, it was adjourned till the next term.

Ethericke vers. Cooper.

PER *Holt* chief justice, if the sheriff takes insufficient bail, he is liable to an action, as well as to amercements.

S. C. 1 Salk. 99.
6 Mod. 122.
Sheriff takes
insufficient
bail.

Rex v. inhabitantes parochiae Boughton in Kent.

Rate to reim-
burse a con-
stable.

Foley's Poor
Laws 11, 32.

Where no
appeal to the
sessions, they
may do that
which two ju-
stices may do.
Shaw's Par.
Law c. 45. f.
10.

A Rate was made by a constable, &c. upon several parishes, to reimburse himself his charges in conveyance of sturdy beggars, &c. according to 14 Car. 2. cap. 12. par 18. which was confirmed at the sessions. And it being removed by *certiorari*, a motion was made that it might be quashed. 1. Because two justices are directed by the statute to confirm it, and not the sessions. But *per Holt* chief justice, where authority is given to two justices of peace to do any act, the sessions may do it in all cases, except where appeal is directed to the sessions. 2. Because the constable has power only to charge his own parish, as constable of which he is put to this expense. And for this exception it was quashed. And *Holt* chief justice took a difference; where several parishes are in one and the same town, such an order may be good. [See the statute, which says, parishes.] But that not being alleged here, it cannot be intended.

Rex vers. the mayor and aldermen of Hertford.

S. C. 1 Salk.
55, 374, 376.
Carth. 503.
1 Sid. 86.

Stat. 4, 5 W.
& M. c. 18.

See *Hart*
127.

Judgment in
quo warranto.

Process in an
information in
nature of a
quo warranto.

AFTER several motions and debates at the bar, leave was given by the court to file an information in nature of a *quo warranto*, in the name of Sir Samuel Astrey, against the mayor and aldermen of Hertford, to know by what warrant they admit persons, who do not reside within the borough, to the freedom of the corporation. And *Holt* chief justice said, that if the defendants were found guilty, they should be fined. And the difference of the judgments in this case and in the writ of *quo warranto* is, that in the latter case the judgment is to seize the franchise into the King's hands, but in the other case only an *ouster* of the particular franchise. That the first process in this case is *subpoena*, and afterwards *distringas*; and it being in a foreign county, there ought to be fifteen days between the *teste* and return.

Covenant ser-
vant, who
serves half a
year, and then
another half.

1 Sess. Ca.
1750. Edit.

121, 5, 51,
124, 68, 74,

89, 183, 156.

2 Sess. Ca 111,

114, 117, 119,

124, 125, 163,

188.

Inhabitants of South Moulton in Suffolk.

AN order was made to remove a woman from B. to C. And upon appeal the matter was set out at large. And it appeared, that she was a covenant servant first for half a year, which time she served; and then for another year, and served half of that. And the question was, whether this was a service for a year within the new statute? And *Rokeby*, *Turton*, and *Gould*, justices, (*ab-*
sente

sente Holt chief justice) held that it was; 1. Because the statute designed only, that the party should serve a year. 2. They held, that it was not necessary, that there should be an order made at the sessions upon appeal. Mr. Jacob.

Coot *vers.* Linch.

JUDgment was given for the plaintiff in the King's Bench in S. C. 12 Mod. Ireland, and costs were taxed. And afterwards error was brought in the King's Bench here, and the judgment affirmed, and the costs taxed. And afterwards error was brought in parliament here, and judgment affirmed. Upon which a *capias* was sued here against the defendant for all the costs given here. And after motion and consideration by the court, the execution was set aside. For by *Holt*, it cannot be good; for in this case a man cannot have a *capias* into any county of England, because the cause of action arises in Ireland, and there the venue is laid. And therefore the original *capias* ought to issue in Ireland. But no *capias* can issue out of the King's Bench in Ireland, and therefore they can have here, neither original *capias*, nor *testamentum capias*, because one cannot have an original. But the method is, to issue a writ, reciting all the proceedings here, directed to the chief justice of the King's Bench in Ireland, and the execution shall be sued there of the whole. For though the judgment is affirmed here, yet the law supposes the parties commorant in Ireland. For the costs are but accessory to the judgment. And such writ or mandate determines the writ of error, and restores the cause in Ireland. And *per Holt* chief justice, it is the very record, which comes here out of Ireland, and not the transcript of it. And it is no objection, that it should be the transcript for fear of the peril of the sea; for one might object in the same manner, that upon error in the Common Pleas the transcript only is removed hither, for fear it should be burnt or lost, before it comes into the King's Bench. But in fact when the record in both cases arrives here, then it is the true record, and not before; and that which is in Ireland, or the Common Pleas, ceases to be the record.

Foster *vers.* Hexam.

WRight King's serjeant came into the King's Bench, and demanded conusance for the bishop of Ely in an action of trespass *quare clausum fregit*, which was removed into the King's Bench

Conusance of pleas claimed by the bishop of Ely.
Post. 475.
12 Mod. 643.
3 Salk. 79, 80.
10 Mod. 128.

3 Leon. 149. Bench by *certiorari*, and bail was put it. And first the warrant
 Gilb. Hist. of attorney under the seal of the bishop, was read in *Latin*, then
 C. B. 158. the record as it was, *viz.* trespass, &c. and then the record pro-
 Mic. 14 Geo. ceeded, *et modo ad hunc diem venit Simon episcopus Eliensis per*
 2. C. B. *Johannem Stone attornatum suum, et petit cognitionem, &c. quia*
 Wells v. Tra- *dicit*, that the place where, &c. is within the liberty of the
 hern and Ety. bishop; *et quod alias, scilicet, Mich. 20 Edw. 3. B. R. Rot. 44.*
 5 Viner 590. in trespass and battery, and *Hil. 21 Edw. 3. Rot. 21. B. R. in*
 P. 23. trespass *quare, &c.* and *Hil. 17 & 18 Car. 2. Rot. 229. B. R.*
 Comb. 319. in trespass and ejectment, and *Mich. 35 Car. 2. B. R. Rot. 151.*
 1 Salk. 183. in trespass, assault and battery, this consuance was allowed; and
 2 Keb. 4. therefore he prays his privilege *habendi cognitionem*; and then the
 Grange v. entry proceeds, *quaesitum est* of the plaintiff, *si quid dicere queat,*
 Simpson. &c. *super quo allocatur, &c.* and then day is given upon the
 roll to the parties at Ely, &c. *et dictum est* to the bishop, *quod*
celeris justitia fiat. The two late records were produced in
 court; but because the old records were not produced, and be-
 cause it was the last day of the term, and therefore unfit for
 such a motion, and because *Holt* chief justice doubted of the
 manner, it was adjourned. For *Holt* chief justice said, that the
 true method of pleading should be, to lay usage immemorial,
 and not to rely upon it, but to produce the allowance in the
 King's Bench or in Eyre. And this is agreeable to the reason of
 the law; for since such privileges do not lie in prescription, but
 in grant, that alone cannot be a title to them, but because that
 if the charter was before time of memory, &c. before the first
 of *Richard I.* the said charter could not be pleaded, therefore by
 the statute of *quo warranto, 18 Edw. 1.* one may lay a usage,
 which is an argument of an ancient grant time whereof, &c. and
 then shew the allowance. But if no such usage hath been, then
 the presumption of the law is destroyed, and they must shew
 the patent, for allowances in the King's Bench or in Eyre are
 not pleadable. See *Foster v. Mitton.* See *Keilw. 189, 190.*
 1 Salk. 183. *1 Sid. 103.* It will be difficult to maintain this method of plead-
 ing. In the case in *17 & 18 Car. 2.* *Holt* said, he remember-
 ed, that no exception was taken to the manner of the demand.
 Adjourned. Mr. Jacob. *Post. 475.*

Between Coote and Graham, and Paternoster and Graham,
Pasch. 1728. Consuance was prayed for the university of Oxford
 in these causes, because the defendant was a gentleman commoner
 of Magdalen Hall, upon producing the chancellor's certificate, &c.
 And a rule was made to shew cause. And July 2. Trinity term
 1728, the rule was discharged. There was no suggestion, nor entry
 of the claim made upon record. Mr. Willes for the university.

A Rent-charge was granted to J. S. out of lands, which were Money demised to several undertenants. The grantee of the rent brought into distrained upon them all for one half year's rent arrear. The te- court upon nants bring several replevins. The avowant makes the same tender plead- ed. avowry against all. The plaintiffs in bar of the avowry plead a Barnes 195, tender with *profert in curia*. And now it was moved, that the 198. bringing in of one sum should serve for all the three avowries, they being for the same rent arrear. And the motion was granted. *Ex relatione m'ri Jacob.*

Hilary Term

10 Will. 3. C. B. 1698.

Sir George Treby Chief Justice.

Sir Edward Nevill

Sir John Powell

Sir John Blencowe

} Justices.

Mosley *vers.* Coldwell.

S. C. Lutw.
36.

Nontenure to
part, and to
other part en-
try by the de-
mandant,
pleaded.

A Formedon in the descender was brought of two mesuages and of several parcels of land in *Shelley*. The tenant *quoad* part pleaded nontenure; *quoad* the residue he pleaded, that the demandant had entred, and was seised thereof; and concludes in abatement. The demandant demurs. *Lutwyche* serjeant for the demandant argued, 1. That the pleading was repugnant and vicious; for the pleading of nontenure *quoad* parcel allows himself to be tenant of the residue; and then the pleading that the demandant is seised of the residue is repugnant; for if that be true, he is tenant of no part, and therefore he should have pleaded nontenure of the whole. 2. The pleading that the demandant has entred is not good, because it does not shew, when he entred, before the writ brought, or after it pending the action. If it was before the writ brought, it is not good; because he had not right to enter, where the tenant might have entred upon him again, and then his action would be revived. 26 *Hen.* 8. 1. a. If it was after the writ sued, then it will abate the writ. *Bro. brieve* 1. *Long* 5 *Edw.* 4. 116, 117. But he should have pleaded it *puis darrein continuance*, and the certain time of entry ought to be shewn. *Girdler* serjeant to the contrary. The plea is good, and could not be better. For as to part the tenant claims nothing, and as to that he pleads generally nontenure. As to the other part he has title, and is tenant at the time of the pleading, but the demandant

5 *Hen.* 7. 7.
5 *Ed.* 4. 116.
21 *H.* 6. a.

demandant has entred upon him, upon whom he has re-entred, yet the demandant after his entry could not have this action of formedon, though it be entailed, for by his entry the estate-tail was executed in him, and although the tenant entred upon him, yet he ought not to have a formedon, but ought to bring his assise, writ of entry, or ejectment, &c. For this action supposes a right descended to him, of which he hath never been possessed; but by his entry he having the possession, the re-entry of the tenant was a tort to his possession, of which he ought to have brought his own action. And that formedon does not lie after an entry, *Fitzb. nat. br. 219. 7 Edw. 4. 19. Bro. formedon 47.* And the time of the entry need not be shewn, no more than the entry by the heir, &c. after the death of his ancestor. And if the tenant had re-entred, the demandant should have replied, and shewn it, for it shall not be intended.

Formedon in descender does not lie after entry.

Powell justice, 1. The tenant having pleaded nontenure *quoad* parcel must be taken to be tenant of the residue, otherwise he should have pleaded nontenure to the whole. 2. The tenant has not pleaded, when the demandant entred, nor is it pleaded *puis la darrein continuance*; and therefore it must be taken before the writ brought. But entry before the writ will not take away the demandant's action, especially if the tenant has re-entred upon him, as shall be intended by this plea; for by the re-entry the action shall be revived. But entry pending the action will abate the writ, and it is a question, whether a re-entry in such case would make the writ good. *Treby* chief justice, formedon in the descender lies only upon a discontinuance made by the ancestor, or when the issue is barred of his entry (which was agreed *per curiam*) for the reason of a formedon is, inasmuch as the party cannot enter, but is put to that action, to recover his right; for where he may enter he ought; and ought not to sue a formedon. And therefore if the demandant's entry be tolled, which must be intended upon the bringing of this action, if he has entred upon the tenant before this action brought, that entry will not make him seised by virtue of the intail; but it will be a disseisin to the tenant, and consequently the tenant's re-entry has revived the formedon, for he cannot have another action. But if the tenant had not re-entred, there the demandant could not have maintained a formedon, being seised of the land, though he be not seised by virtue of the estate-tail. The tenant in this case must be taken to be tenant of that part of the land whereof he has pleaded the entry, &c. by his pleading of nontenure to the other parcel. And if the demandant has entred upon him, it must be intended pending the writ, and which ought to be shewn; but no time of the entry being shewn, the demandant could not reply to it; for he could not say, that he

Entry before the writ brought will not abate the action.

Entry pending the action will abate the writ.

Formedon, when it lies?

he has not entred pending the writ; for that is not pleaded; and to say that he did not enter generally would not be good; and he might have entred before the writ brought, and yet no cause that the writ should abate, as appears by what is said before. Judgment *quod respondeat ulterius. Ex relatione m^ri Place.*

Kinsey *vers.* Heyward.

S. C. Lutw.
256.
2 Saund. 152.
2 Mod. 70,
71.
Cro. Car.
245.

Writ by jour-
neys accounts
by the same
party.

JUDgment was given in this case for the plaintiff by Treby chief justice, Nevill and Powell justices, against the opinion of Blencowe justice: The case was thus; the plaintiff declared as administratrix to her husband against the defendant as executor to Heyward in *indebitatus assumpsit*. The defendant pleaded *non assumpsit infra sex annos*. The plaintiff replies, that her husband sued a writ of *clansum fregit* returnable in this court, in which he intended to declare in *assumpsit* for this debt against Heyward; that Heyward died, and her husband sued another writ against the defendant; that then her husband died, and she being administratrix to her husband sued this writ, &c. The defendant demurred. And the court gave their opinions in solemn arguments on the bench. (But the arguments of the three *puisne* justices were not heard by Mr. Place.) Treby chief justice, 1. In this case this writ is not maintainable by journeys accounts; for a writ by journeys accounts is maintainable only by the same plaintiffs, or one of them at least, who sued the first writ; but where the plaintiff dies, a writ by journeys accounts cannot be brought by his executor, &c. And this appears by *The terms of the law, Fitzherbert, and Statbam*, in title *Journeys accounts*. If the defendant dies, there the plaintiff may pursue a writ by journeys accounts against his executors, &c. or if there are two plaintiffs, and one of them dies, the survivor may have such a writ, he being the same person who sued the former writ; but a writ by journeys accounts is maintainable in no case, but by the same plaintiffs, or some of them who were plaintiffs in the former writ; but in no case shall be brought by an executor, or heir, &c. *Rast.* 107, 108, 417. 3 *Cro.* 174. *Bro. journeys accounts.* 23 *Theolal* 407. b. 1 *Ventr.* 235. And without doubt there have been several occasions offered, to bring such a writ by executors, &c. which would have been brought, if the law would have allowed it. And the case of *Estob v. Thorowgood*, adjudged in this court *Mick. 9 Will. 3.* [See before, 283.] A general executor brought a writ by journeys accounts upon a writ brought by the executor *durante minoritate*, and adjudged that the said writ was well brought. And he said, that he was then of the same opinion; but he never was ashamed to retract his opinion, when he is convinced upon better reason; and for this reason he

he declared that he thought the said judgment was not maintainable, upon the reasons upon which it was given, viz. that an executor may have a writ by journeys accounts upon a writ abated, brought by the executor *durante minoritate*; but the judgment was notwithstanding well given upon other reasons. But in no case can a writ of journeys accounts be, but by the same plaintiffs, or some of them, who were plaintiffs in the former writ. And to say, that the general executor, and the executor *durante minoritate*, were as one person in the office, is to strain the point too far; for it must be the same plaintiff, not only by representation, but by name; for the second writ is a continuance of the first, which cannot be but by the same person, not only in representation, or in respect of their office, but strictly and truly the same person. 2. In this case the writ cannot be by journeys accounts, because the former writ ought to be continuing in court and returned. *Fitzb. journeys accounts* 22. *Rast. Entr.* 417. *11 Hen.* 6. 34. For the writ is not in court before it is returned, but in this case it does not appear that the first writ was returned. 3. In this case the first writ was a *clausum fregit*, which writ is not maintainable, nor can be continued against executors; and the second writ ought always to be the same with the first, and usually they were entred upon the same roll, and both together made only one record. 4. In this case there is nothing of journeys accounts before us, for the second writ is not said to be brought *per dietas computatas*, as all the precedents are; though the meaning of the said words he did not well apprehend. The word *dieta* signifies a day's journey, and the best account of the word is given by *Selden*, that the Chancery being a movable court, and following the King's court, and the writs being to be purchased out of the said court; the party who purchased the second writ ought to have applied to the King's court, as hastily (that he might obtain the second writ) as the distance of the place would allow, accounting twenty miles for every day's journey; and for this reason he was to shew in the second writ, that he had purchased his second writ as hastily as he could, accounting the day's journies he had to the King's court. But it has been urged by the counsel, that the death of the plaintiff, being the act of God, shall not do a prejudice to any, and the executor of such person dying ought not to be prejudiced by the testator's death, to lose a writ which was well commenced. Answer, That the said rule, viz. *quod actus dei nemini facit injuriam*, admits of several exceptions, and it will prejudice the party in divers cases. The statute *de bonis asportatis*, &c. is an instance; for at common law before the said statute made, by the act of God executors were prejudiced in *quare impeditis*; and in all actions and cases where damages only are recoverable, which arise *ex delicto*, unless in cases which arise upon deeds or contracts. A pawn is not redeemable after

The first writ ought to be returned.

Clausum fregit does not lie against an executor.

Second writ the same with the first.

Journeys accounts, what?

Act of God a prejudice.

Pawn.

Statute of li-
mitations.

Ante 386.
Post. 880, 553.

A year rea-
sonable time.

after the death of the pawnor. In appeal the next heir dies after the appeal brought, the appeal is lost. And for this reason the said rule will not support this writ by journeys accounts. But that which is said by Coke, 6 Rep. 10 b. *Spencer's case*, is law; that an executor, &c. shall not have a writ by journeys accounts. But though this writ is not good to continue the former, and by such means to avoid the statute of limitations; yet the plaintiff here ought to recover notwithstanding the said statute pleaded. For the statute is, that actions upon the case, &c. shall be sued within the six years, &c. and for this reason where an action is sued within the six years, that seems to be excepted out of the words of the statute; and that if an action is sued within the said time, the party is out of the purview of the act, and at liberty to prosecute the said action, or to sue another action at any time not restrained or limited by the statute. And in this case an action was commenced within the six years. Though the former was a writ of *clausum fregit*, and this is an *assumpsit*; yet by the course of the court it is the same action, the *clausum fregit* being a general writ, upon which a man may declare in any other personal action, as a *latitat* in the King's Bench. And therefore the statute is satisfied in this case by the suing of the *clausum fregit*, and the plaintiff thereby set at liberty out of the restraint of the said statute. As if a copyholder has licence to make a lease, his lessee may make an underlease, for by the licence it is exempt from the custom of the manor. 1 Roll. Abr. 508. But though by the suing of an action the party seems to be set at liberty, without any restraint of time in which he ought to prosecute his action, or to bring a new action; yet by the reason of the statute he ought to be restrained to some reasonable time. For the statute being made for settling some time for the bringing of actions, it ought to be expounded according to such intent; and where the words are silent, a reasonable time by construction ought to be made. But it is difficult in this case to settle, in what time an action shall be brought, where another action hath been commenced within the six years. But it seems to me, a year ought to be a reasonable time; for it is the time in which the law delights, as may be instanced in many cases. Co. Li. 254. b. 2 Inst. 476. Plowd. 353. *Stowell and Zouche's case*. For though the statute binds the right of the party, and therefore ought to be taken strictly, yet the party shall be bound to some reasonable time, and a year being the time which the law in many cases adjudges reasonable, (see 2 Keb. 764.) therefore in his opinion if a writ be brought within the six years, although it be discontinued by death, &c. and the six years expire; yet the statute of limitations will not be a bar, if another action be commenced in reasonable time, and a year shall be said a reasonable time. Objection. That in this case the former writ was sued more than five years

years ago, and it does not appear that the former writ was ever returned, or that any thing has been done for more than five years.

Answer. That a writ being shewn to be sued out, it shall be intended to be returned, and also to be continued, if the contrary be not shewn by the defendant. For the discontinuance or failing of any process shall not be intended without being shewn. And it is not necessary to shew all the continuances, for that would make the replication too prolix; and if the continuances should be pleaded, they ought to be pleaded every one particularly, and *debito modo continuat.* would not be sufficient. And in *Every* and *Carter's* case, *2 Ventr.* 254. the continuances were not pleaded. And *Stile* 401. resolved there, that the continuances need not be pleaded, and that the bringing of the action prevents the statute of limitations. *1 Sid.* 228. was cited. Judgment for the plaintiff. *Ex relatione m'ri Place.* Afterwards error was brought upon this judgment in *B. R.* and after argument at bar twice the judgment was reversed; because the continuances of the writ were not pleaded, and it was not said that the writ was undetermined. *Mich.* 13 *Will.* 3. *B. R.* 1701. And upon error brought in parliament the judgment of the King's Bench was affirmed, *Friday* the first of May, 1 *Annae reginae* 1702. upon the same point of not having entred the continuances, &c.

A writ sued shall be intended to be returned.

Continuances need not be pleaded.

Intr. Hill. 11 Will. 3. B. R. Rot. 287.

Churchwardens of Market Bosworth *vers.* The rector of Market Bosworth.

THE plaintiffs libel against the defendant in the archdeacon's court of *Leicester*, that there was time whereof, &c. and is, a chapel of ease within the same parish; and that the rector of the said parish for time whereof, &c. hath repaired and ought to repair the chancel of the said chapel; and that the chancel being out of repair, the defendant being rector hath not repaired it. The defendant in the said court denied the custom. And a decree was made for the defendant, that there was no such custom. And costs were taxed there for the defendant. And *Wright* King's serjeant moved for a prohibition. And (by him) it ought to be granted, because it appears, that the libel is upon a custom, which the defendant has denied; and it may be the question was in the Spiritual Court, custom or or not, which is not triable there, but at common law. And then this appearing upon the libel, that the court has not jurisdiction, a prohibition may be granted after sentence. But all the court *e contra.* For (by the chief justice) the reason for which the Spiritual Court ought not to try customs is, because they have different notions of customs, as to the time which creates them, from those that the common law hath. For in some cases the usage of ten years, in some twenty, in some thirty years, makes a cus-

Custom or not, tried by the Spiritual Court.

Cro. El. 659. Ro. Abr. 308. (U) p. 21.

a custom in the Spiritual Court; whereas by the common law it must be time whereof, &c. And therefore since there is so much difference between the laws, the common law will not permit that court to adjudge upon customs, by which in many cases the inheritances of persons may be bound. But in this case that reason fails, for the Spiritual Court is so far from adjudging, that there is any such custom which the common law allows; that they have adjudged, that there has not been any custom allowed by their law, which allows a less time than the common law, to make a custom. And the plaintiffs having grounded their libel upon a custom, which was well grounded, if the custom had not been denied (for libels there may be upon customs) but the custom being denied, and found no custom; it is not reason, to prohibit the court in executing their sentence against the plaintiffs. For the design of the motion for a prohibition, is only to excuse the plaintiffs from costs. And there is no reason, but that they ought to pay to them, since it appears, that they have vexed the defendant without cause. And therefore a prohibition was denied.

Nicolas administrator of Wildbore *vers.* Killigrew.

Where an executor or administrator shall pay costs upon nonsuit, &c.

2 Barnes 106. Grey v. Lockwood, Trin. 16 & 17 Geo. 2. Ibid. 100, 102, 122, 123.

Nota; The rule hath constantly been, that where an executor or administrator can bring the action in his own right, and yet brings it *quâ* executor, &c. there if he fails he shall pay costs; but if he could not bring the action otherwise than *quâ* executor, tho' he fails, he shall not pay costs.

THE plaintiff brought *indebitatus assumpsit* against the defendant, and declared for so much money due to the intestate, paid to the defendant after the death of the intestate, to the use of the plaintiff his administrator. The plaintiff was nonsuit. And whether he should pay costs or not, was the question. And it was urged for the defendant, that he ought to pay costs, inasmuch as the action being brought for money received to his use after the death of the intestate, the naming of himself administrator is surplusage, and to no purpose, for he might have brought the action in his own name; and where a man may have an action in his own name, though he brings it as executor or administrator, if it be found against him, he must pay costs, as hath been frequently settled, not only in this court, but also in the King's Bench. *Birch* serjeant for the plaintiff, that he ought not to pay costs in this case; for he could not have brought the action without naming himself administrator; for the case was, that the intestate was a soldier in a regiment of which the defendant was colonel, and died having arrears of his pay due to him from his majesty, and the plaintiff took administration, and afterwards the money was paid to the hands of the defendant, to discharge the arrears of the regiment; and for the intestate's share of the said money upon account of his arrears, the action is brought. But it could not have been brought otherwise than as administrator, for other-

2 Barnes 123. Mic. 25 Geo. 2. Bligh v. Cope, in C. B.

wife the plaintiff could not make title to it; for if he had brought the action in his own name, not as administrator, he could not have recovered. *Treby* chief justice, The plaintiff has declared of so much money received to his own use after the death of the intestate, and therefore the naming himself administrator is not to any purpose; and we ought to take the case, as it is upon the declaration. And by him and *Powell* justice, if *A.* be indebted to the intestate before his death, and after his death *A.* pays the said debt to *B.* by direction of the administrator, there the administrator may sue *B.* without naming himself administrator; and though he does name himself administrator, it is void, and he must pay costs, if the action be found against him. Or if *A.* pays it to *B.* to the use of the administrator without his direction, yet the administrator may have an action against *B.* in his own name, and he shall pay costs. But in such case he hath election, to bring an action against *B.* or *A.* the first debtor; and if he brings it against *A.* it must be as administrator, and he shall not pay costs. For in all cases where an executor or administrator sues for a debt or other thing belonging to the testator, &c. and grounds his action upon the same contract that was to the testator; he shall not pay costs if he fail in the suit: but if he grounds his action upon a contract expressed, or by implication and operation of law, which accrues to him after the death of the testator; there the action lies in his own name, and the naming him executor, &c. is void, and he shall pay costs. And in this case these two judges were of opinion, that the money being paid to the defendant, to discharge the arrears of the said regiment, there being an arrear due to the plaintiff as administrator of the said *Wildbore*; the plaintiff might have *indebitatus assumpsit* against the defendant for so much money received to his use; although no money was expressly paid to the defendant to the use of the plaintiff. But admitting that in this case the plaintiff ought to name himself administrator, to intitle himself to this money due to him and received by the defendant; the duty due to the intestate being altered, and being become a duty due from another person after the death of the intestate, the plaintiff ought to pay costs. And *per Treby* chief justice, if the executor, &c. bring an action upon an *insimul computasset* with himself after the death of the testator, he shall pay costs; and yet it is for a duty due to the testator, and not altered, for the accounting with the executor does not give a new duty, but only ascertains that which was due before.

¹ Barnes 102,
^{103.}

Where a man brings an action as executor, and where in his own right.

Indebitatus assumpsit for money received to his use brought by an administrator.

Contra adjudged, T. Jones
^{47.}
² Lev. 165.

Lawrence *vers.* Dodwell.

S. C. Lutw.
734.
Averment
that a devise
by the hus-
band to the
wife was for
her jointure.

Saunders chief
justice's case.
Devise of land
which he
should have
hereafter.

Relief in
Chancery.
2 Cha. Caf.
24.

1 Cha. Caf.
181.

1 Vent. 340.
4 Rep. 1, 2.

Co. Lit. 36. Moor pl. 103. Cro. El. 128. 3 Leon. 272. 3 Rep. 27. 4 Vern. 365.

DOWER. The defendant pleads, that the husband was seised of the land in question, and of other lands in *A.* and that he by his will devised the lands in *A.* to the demandant for her life, and died, and that the demandant entred into them by virtue of the said devise; and avers, that the land devised was devised to her by her husband in satisfaction of her dower. The demandant demurs. And after arguments at the bar by *Levinz* serjeant and *Pawlet* serjeant for the tenant, and *Wright* for the demandant, judgment was given for the demandant by the whole court; because the averment, being of a matter out of the will, and not contained in it, ought not to be allowed; and that *Leak* and *Randal's* case, 4 Co. 4. *a.* being exprefs in point, and always allowed for law, ought not to be questioned at this day. Judgment for the demandant. See *Bro. dower* 69. *Poph.* 188. *Dier* 124. 3 *Cro.* 856. that in such case the tenant has no need to plead, that it was devised *pro junctura*. See *Dier* 377. *Rast. entr.* 233. *b.* which *Powell* justice agreed. *Dier* 125, 220. And *Powell* cited the will of lord chief justice *Saunders*, who devised all his lands, which he had, or afterwards should have, in *Fulham*; and *Maynard* was of opinion, that that devise was not good for land there, which he had afterwards purchased; but *Holt* and *Pollexfen* chief justices *contra*; but that was agreed by the arbitrament of *Holt* and *Powell*. And (by him) if in this case any intent of the devisor had appeared in the devise, that it should have been a bar of the demandant's dower, the devise should have been pleaded at large, and the court would have adjudged it to be in bar of her dower. But afterwards upon a bill brought in Chancery by the defendant, being heard by the lord chancellor *Somers*, he was of opinion, that in equity such averment of the testator's intent ought to be admitted, and that the wife in such case should not have both her dower and the land devised; and (as I have heard) decreed in this case accordingly*.

* But this decree was reversed by *Wright* lord keeper in *Mich.* 1702, which decree of reversal was affirmed in the house of lords with 30*l.* costs, 17th May 1717. 1 *Eq. Cases Abr.* 219. Note; The principal reason of this reversal of lord *Somers's* decree, and the affirmance of the decree of reversal in the house of lords was, that the widow had brought a writ of dower in *C. B.* and recovered, and so the matter had been before determined at law, and if it was a bar at all it was a bar at law.

Easter

Easter Term

11 Will. 3. B. R. 1699.

Sir John Holt *Chief Justice.*

Sir Thomas Rokeby

Sir John Turton

Sir Henry Gould

} *Justices.*

Wicket and Foot *vers.* Cremer.

A. And *B.* sued an action against *C.* and recovered judgment. *A.* C. brings a writ of error. *B.* dies, pending it. *A.* sued two *scire facias*'s against *C.* and upon two *nibils* returned he had award of execution against *C.* and took his goods in execution. And now Mr. Robert Eyre moved to set aside the execution, *quia erronee emanavit*, because the writ of error does not abate by the death of the defendant in error, and therefore the execution of the judgment was suspended by it. And of that opinion was Holt chief justice, and the whole court. And the rather here, because the *scire facias*'s were returned *nihil*; so that it appears, that the defendant had no day to plead to it. But if the return had been *scire feci*, it might have been otherwise, because he had a day to plead. Upon which difference a man is allowed, or disallowed, to have an *audita querela*. But in fact *A.* need not to have sued a *scire facias*, because the judgment survived to him. And a *supersedeas* was granted, &c. And per Holt chief justice, in many cases, where a man may have an *audita querela*, the King's Bench will relieve upon motion; but if the ground of the *audita querela* be a release, or other matter of fact, it may be reasonable to put him to his *audita querela*, because the plaintiff may deny it.

S. C. 1 Salk.

264.

S. C. 12 Mod.

240.

Vent. 34.

Execution su-

perfeded.

Bro. Error

p. 188.

Writ of error

abated.

Jenk. 140.

pl. 86.

F. N. B.

20 (E.)

Scire facias

returned *nihil*.

Audita que-

rela.

12 Mod. 584.

Rex

Rex *vers.* Harris.S. C. 1 Salk.
260.S. C. Comyns
61.

Carth. 496.

5 Mod. 443.

Restitution

hundred.

51 Eliz. c. 11.

PER Holt chief justice, a man indicted of forcible entry may hinder the justices from awarding execution, either by traversing the force (though the books heretofore have been *pro* and *con* as to that opinion) or by plea of possession of three years, &c. which means *Holt*, being then council, used in the case of Sir Robert Atkins and the lord Brounker, in an indictment for forcible entry concerning *St. Catharine's hospital*, removed by *certiorari* into the King's Bench, *Post.* 482.

Shales v. Seignoret.

Intr. *Pasch.* 10 Will. 3. B. R. Rot. 158.S. C. Lutw.
516.S. C. 12 Mod.
258.Covenant to
transfer bank-
stock.

12 Mod. 533.

3 Salk. 342,

343.

5 Rep. 114.

b.

Post. 688.

Covenant upon articles of agreement. The plaintiff declares, that it was covenanted and agreed between him and the defendant, that he in consideration of twenty guineas by the defendant to him then paid should transfer to the defendant before or upon the nineteenth of *November* 1695 1000*l.* of bank-stock; and that the defendant covenanted with the plaintiff to accept it, upon notice of three days, and to pay to the plaintiff for it 940*l.* and then the plaintiff avers, that no bank-stock is transferrable by law but in the office of the bank of *England*, in the presence of both the parties; and that he gave three days notice to the defendant, that he would transfer to him the bank-stock in the office of the bank the nineteenth of *November*; and that he attended there the whole day to have transferred it; but that the defendant did not come to accept it; for which he brings this action for the 940*l.* &c. The defendant after *oyer* of the articles pleads, that the plaintiff nor none of his assigns had any interest in any bank-stock upon the eighteenth of *November*, &c. The plaintiff demurs. And the whole court was of opinion, that the plea was ill; because though the plaintiff had not any bank-stock upon the eighteenth of *November*, yet if he had it the nineteenth, he might have performed the contract within the time; for the covenant was not, that he should transfer any particular 1000*l.* of bank-stock, which he had at the time of the covenant, but any 1000*l.* of stock. But then the whole court held, 1. That this action will not lie for the plaintiff in this case, because it appears that the plaintiff has not transferred; and without transfer to the defendant, the defendant is not bound to pay the money, for the money was to be paid upon the transfer; and therefore no transfer, no money. *Co. Li.* 304. *Dier* 371.

No transfer,
no money.

2 Mod.

2 Mod. 266. *Otway v. Holdips*. But the matter in the declaration might have been a good excuse for the plaintiff, if the defendant had sued him for not transferring the bank-stock; or the plaintiff might have assigned his breach in the non-acceptance of the stock by the defendant. 2. The court held, that it did not appear to the court but that the bank-stock was transferrable at another place than at the office of the bank; for though the act says, that no transfer shall be but as the King shall appoint, and the King has appointed it to be at the office of the bank, and not in any other place; yet that ought to have been pleaded, or otherwise the court cannot take notice of it: and therefore notwithstanding any thing that appears here to the contrary, the transfer might have been in any other place; and then a tender ought to have been made to the person. Sir *Bartholomew Shower* and Mr. *Northby* argued for the plaintiff; *Darnall* and *Wright*, King's serjeants, for the defendant. Judgment for the defendant.

The court will not take notice, that bank-stock is assignable only at one place.

Tender.

Dart *vers*. Hall.

MR. *Carthew* moved for a prohibition to be directed to to stay a suit against *Dart* for tithes of an old mill, viz. for every tenth toll dish, upon a suggestion that it was an old mill. But *per Holt* chief justice, the plaintiff ought in his suggestion to lay a prescription *in non decimando*, and also bring an *affidavit* to the court of the truth of the fact. And so it was done upon debate in the time of *Hale* chief justice, between *Hughes* and the lord viscount *Hereford*. See *Winch entr.* 552. pl. 1. *Brown vers. Nicholson*.

Prohibition to a suit for tithes of an old mill. S. C. 12 Mod. 243. Di. 170. Brownl. 32. Bunbury 73, 184. Stat. Artic. Cleri. 2 Ro. Rep. 84. Ro. Rep. 405. p. 15. 3 Bulst. 212. Hughes v. vic. Hereford.

Lugg *vers*. Lugg.

IT was decreed by commissioners delegates, of whom *Treby* chief justice of the Common Pleas was one, since the last term, that where *A.* had made his will, and thereby devised all his personal estate to *B.* and *C.* and afterwards *A.* married *D.* and had by *D.* several children, and then died, without having taken any notice of this will, that this marriage of *A.* with *D.* amounted to a revocation of this will, but that it was only a presumptive revocation; and therefore if by any expression, or any other means, it had appeared that the intent of *A.* was that this will should continue in force, the marriage would not have been a revocation of it. And the sentence in the spiritual court was affirmed. *Ex relatione m'ri Chesbyre*.

S. C. 2 Salk. 592. Marriage and having children, revocation of a will. Eq. Ca. Abr. 413. pl. 14, 15. 1 Salk. 257.

The governor and company of the bank of England
vers. Newman.

Wednesday May 3.

S. C. Cases in B. R. 241. **B**ellamy signed a bill payable to Newman or bearer. Newman came to the bank of England, and asked, how much money they would give him for this bill. They took the bill, and gave him so much money, allowing so much for discount. After that the bank received 10000 l. of Bellamy; and afterwards they send a man, to demand the money due upon this bill of Bellamy; and a demand was made of Bellamy's servant, who did not pay the money. And afterwards Bellamy fails; and the bank sue Newman for the money which he had received of them for this bill, as for so much money lent by them. And upon the general issue pleaded, it being tried before Holt chief justice in London the sitting after the last term, the verdict was for the plaintiff against his opinion. And now a new trial was granted, because this was a plain sale of the bill. For per Holt chief justice, if a man has a bill payable to him or bearer, and he delivers it over for money received, without indorsement of it; this is a plain sale of the bill, and he who sells it, does not become a new security. But if he had indorsed it, he had become a new security, and then he had been liable upon the indorsement. But upon a new trial the jury found for the plaintiffs.

The bearer indorses a bill payable to a man or bearer, he becomes a new security.

Rex vers. Flint.

S. C. 2 Salk. 687. **T**HE defendant was indicted, for that, that he being *communis pistor* sold *sex collyros debitum pondus minime content.* Vide Stat. 8 Ann. cap. 18. And upon demurrer to this; judgment was, that the defendant *exoneretur*; because the indictment is too uncertain, for it does not appear to the court to be an offense. Mr. Northey for the King cited the opinion of Roll. Stile 186.

Uncertain indictment. Lamb. 356. Dalton 146, 155.

S. C. 2 Salk. 553. **H**OLT chief justice denied to grant a prohibition to the admiralty court, upon a suggestion, that they there refused to give to the party sued there a copy of the libel; because the statute extends only to ecclesiastical courts, and not to the admiralty court. Upon the motion of Mr. Hall.

Prohibition for want of a copy of the libel. 2 Hen. 5. cap 3. See 6 Mod. 156, 308.

White

White *vers.* Eldridge and his wife.

TRespass against husband and wife. Upon not guilty pleaded, verdict for the plaintiff. And now Sir Francis Winnington moved in arrest of judgment, that the wife could not be charged for the trespass of the husband, no more than they can be charged for the conversion of goods *ad usum ipsorum*. But the court overruled the exception.

Cr. Car. 366.
2 Bulstr. 421.
Trespass against husband and wife.

2 Lev. 145.
Keb. 440.
Bro. tit. Bar. and Feme, pl.

32.
Leon. 312.
1 Ro. Abr. 2. pl. 7.

Rex *vers.* Cole.

Guildhall May 20.

THE defendant *Cole* was indicted for that, that he being a bankrupt, and brought before the commissioners, refused to give them an account of his effects, &c. And the defense at the trial, upon not guilty pleaded, was, that he was an infant at the time of the debts contracted, and therefore could not be a bankrupt. And of this opinion was *Holt* chief justice. For (by him) though the debts of an infant are only voidable by him at his election; yet no man can be a bankrupt, for debts which he is not obliged to pay. And the defendant therefore was acquitted.

S. C. Tre-mayn's Entr. 198.

Holt 360.
Cases in B. R.

243.

Infant cannot be a bankrupt.

S. C. 12 Mod.

243.

Cases in

Chan. in Ld.

King's time,

46, 47.

Lambert *vers.* Oakes.

Guildhall May 20.

R. Signed a note under his hand payable to *Oakes* or his order. *Oakes* indorsed it to *Lambert*. Upon which *Lambert* brought the action for the money against *Oakes*. Per *Holt* chief justice he ought to prove, that he had demanded, or done his endeavour to demand, this money of *R.* before he can sue *Oakes* upon the indorsement. The same law if the bill was drawn upon any other person payable to *Oakes* or order. And the demand, to intitle *Lambert* to his action, must be after the indorsement. 2. *Oakes* had indorsed this blank bill to *Lambert*, viz. by the writing of his name only, upon discount; and therefore it was urged by Mr. *Northey*, that this was a plain sale of the bill, and the indorsement shall not subject the indorser to an action, because the bill cannot be sold, to intitle the vendee to take the benefit of it, without indorsement; and the practice among merchants is so. But *Holt* *e contra*. For their practice cannot alter the law. And the indorsement,

S. C. Cases in

B. R. 244.

Holt 117.

Demand against the

drawer before

he can sue the

indorser.

12 Mod. 244.

1 Salk. 127.

Indorser liable.

Blank in-
dorsement.Demand of
the drawee.Forged bill
indorsed.

ment, though upon discount, will subject the indorser to an action; because it is a conditional warranty of the bill, and makes a new contract, in case the person upon whom it was drawn does not pay it. 3. *Per Holt* chief justice. If *A* indorses a bill blank to *B*. he thereby puts it in the power of *B*. to overwrite what *B*. pleases. 4. If the indorsee does not demand the money payable by the bill, of the person upon whom it is drawn, in convenient time, and afterwards he fails, the indorser is not liable. 5. If the action be brought against the indorser, it is not necessary to prove the hand of the drawer; for though it be forged, the indorser is liable.

Todd *vers.* Stokes a parson who lived at Chichester.

Guildhall May 24.

S. C. 1 Salk.
116, 119.
Husband
bound for
goods had by
the wife.
Sid. 124.
12 Mod. 245.
Chan. Prec.
499.
6 Mod. 171.

THE plaintiff being an apothecary brought an action against the defendant for medicines for the defendant's wife, &c. Upon *non assumpsit* pleaded, upon the trial it was proved, that the defendant and his wife, upon discontent conceived between them, had been separated by consent for five years; and that upon the separation the defendant signed articles to certain trustees, by which he obliged himself to allow his wife twenty pounds a year; which he had done accordingly ever after; that the plaintiff, when he accommodated the defendant's wife with these medicines, did not know that she was a married woman, &c. And it was ruled by *Holt* chief justice, that the defendant was not bound to pay the plaintiff's bill. For though the plaintiff had not personal notice of their separation, and though it was not the general reputation in *London*, where the plaintiff lived, that the defendant and his wife were separated; yet since it was the general reputation in the place where the defendant lived, and that for five years past; it was enough to exempt the defendant's wife from being capable to charge the defendant, though for necessaries. But if the wife had come immediately from her husband after the separation, before it could have been publicly and generally known, and had taken up necessaries upon credit, the husband would have been liable. And therefore in this case the plaintiff was nonsuit.

Lungworthy
v. Hockmore.

Note, it was ruled by *Holt* chief justice at *Exeter Lent* assizes, 10 *Will. 3.* between *Lungworthy* and *Hockmore*, that if the husband turns away his wife, and afterwards she takes up necessaries upon credit of a tradesman; the husband shall be liable to the tradesman to pay for them. But if the wife elopes, though the tradesman has no notice of the elopment, if he gives credit to the wife,

wife, the husband is not liable. If the wife tells her husband, that she will buy such a thing, which is necessary, and the husband tells her, that he will not allow it, and forbids the tradesman to give his wife credit for it, and afterwards the wife takes up that thing of the same tradesman upon credit given her by him; the husband is not liable. It is sufficient for the husband to give general notice, that people do not give credit to his wife.

Dodd *vers.* Beckman and Carman:

BECKMAN being arrested at the suit of *Dodd*, put in bail to the ^{Vacat of judg-} action. And afterwards *Dodd* obtained judgment against *Beck-* ^{ments.} *man*. And after a *capias ad satisfaciendum* sued against *Beckman*, and *non est inventus* returned upon it, *Dodd* sued two *scire facias*'s against *Carman* as bail of *Beckman* in the aforesaid suit. And after two *nichils* returned, and judgment against the bail, he took the goods of *Carman* in execution. And now Mr. *Northey* moved, that *Carman* might have his goods out of the sheriff's hands, and that a *vacat* should be made of the judgment, upon *affidavit* that *Carman* was not at *London* all the day in which the bail was supposed to enter into the recognisance, and therefore that he was personated, and for this reason that all ought to be set aside. And for this he relied upon 2 *Cro.* 256. *Cotton's* case. Upon which the court referred it to the master to be examined, who reported the fact to be thus, *viz.* That *Beckman* being arrested at the suit of *Dodd*, gave a bail-bond to the sheriff, to appear at the return of the writ. And at the return of the writ he put in bail before Mr. justice *Rokeby*, to which not being sufficient, *Dodd's* attorney excepted; and for want of justification of this bail, or of putting in of better bail, obtained an assignment of the bail-bond; upon which *Beckman* came to *Dodd's* attorney, and told him, that he would put in *Carman* as additional bail. Afterwards *Dodd's* attorney went to search in the judge's book, and there he found *Carman* added to the bail-piece. And then he proceeded regularly in obtaining judgment against *Beckman*, and afterwards judgment against *Carman*, and in taking these goods of *Carman* in execution. The master reported also, that at the day when *Carman* is supposed to have been before the judge, and become bail for *Beckman*, he was at *Canterbury*, as appears by an *affidavit* made to that purpose by *Carman's* servant. But farther, that *Carman* had been bail for *Beckman* in two actions in the Common Pleas before Mr. justice *Blencowe*, within five or six days after the time that he is supposed to have been entered as bail in Mr. justice *Rokeby's* book in this case, and that *Beckman* was bound in a bond with *Carman* for *Carman's* debt about the same time, or a very little time after;

and that *Beckman* was insolvent, and gone beyond sea. Upon which the court refused to discharge the proceedings against the bail, but discharged the rule of reference. See 3 *Keb.* 694. 1 *Ventr.* 301. *Beasley's case.* 1 *Ventr.* 49. *Parris's case.* *Palm.* 197. *Chapleyn v. Alleyn.* 19 *Hen.* 6. 44. 21 *Jac.* 1. cap. 26. 4 & 5 *Will. & Mar.* cap. 4. Sir *Bartholomew Shower* and myself council for *Dodd.*

Prohibition
for words in
the spiritual
court.

S. C. 12 Mod.

242.

S. P. *ibid.* 248.

A Libel was preferred in the ecclesiastical court for scandalous words, viz. "You are a damned bitch, whore, a pocky whore, and if you have not the itch, you have the pox." And Mr. *Mulso* moved for a prohibition, because an action lies at common law. And he put this difference, where the word pox is joined with other words, so that it cannot be understood but of the *French* pox, there the action lies. And he cited 3 *Cro.* 2. Which *Holt* chief justice agreed, and said, that the joining it with the word whore would make it be understood of the *French* pox, which is actionable. And he cited a case, where the words were; He got the pox by a yellow haired wench in *Moorfields*; and they were held actionable. And a prohibition was granted.

Rigden *vers.* Hedges.

S. C. Cases in

B. R. 246.

12 Mod.

Rescue con-
fable in the
admiralty.

Judgment,
when en-
trable?
Practice.

IF a ship be arrested by process out of the admiralty court for a matter arising within their jurisdiction; though she be rescued at land, the consuance of the rescue belongs to the admiralty; otherwise not. *Per Holt* chief justice. See 1 *Ventr.* 1.

BY *Holt* chief justice. If the *distringas* be returnable at a day within the term, judgment may be entred on the crown side, though there be not four days remaining. But four days ought to be given, if there are so many. In the case of *Knox* and *Levarée*, who were tried for a misdemeanor three days before the end of the term in the time of lord chief justice *Scroggs*, Sir *Samuel Astrey* certified, that judgment could not be entred; but upon conference between Sir *William Jones*, then attorney general, and the chief justice, it was settled, that the antient practice of the court was according to the difference before, and that it was misreported; and judgment was entred against them. *Ex relatione m'ri Jacob.*

The bishop of St. Davids *vers.* Lucy.

LUCY promoted a suit *ex officio*, &c. before the archbishop of Canterbury against the bishop of St. Davids upon several articles for simony and other offenses. To which articles Dr. Thomas Watson the bishop of St. Davids put in his answer. And proof being offered on the behalf of the promoter, the bishop appealed to commissioners delegates. And pending the appeal he moved in the King's Bench for a prohibition, upon a suggestion, that the matters contained in the articles were of temporal consequence, &c. And at the beginning Sir Bartholomew Shower argued for the prohibition; that it does not appear, that the bishop of St. Davids was cited to appear in any court whereof the law takes notice; for the citation is, that he should appear before the archbishop of Canterbury, or his vicar general, in the hall of Lambeth house, to answer, &c. which is not any court whereof the law takes notice. For the archbishop has the same power over his suffragan bishops, as every bishop hath over the clergy of his diocese; but no bishop can cite the clergy before himself, but in his court. And therefore the citation ought to have been here, to appear in the *Arches*, or some other court of the archbishop, &c. But to this it was answered by Wright King's serjeant, that without doubt the archbishop had jurisdiction over all the clergy, as well bishops as others, within his province. And for that he cited the case of Dr. Wood bishop of Litchfield and Coventry, who in the year 1687 was suspended by archbishop Sancroft for dilapidations, and the profits of the bishoprick were sequestered, and the episcopal palace was rebuilt out of them; and he died under that sequestration. He cited also the case of Marmaduke Middleton bishop of St. Davids, who upon the eighth of May in the year 1582 was suspended by the high commissioners for misapplication and abuse of the charity of Brecknock (which is one of the crimes of which this bishop is accused). *Whitgift's Register* 177. And though that suspension was made by the high commission court, yet that will make no difference; because the high commissioners have not any new jurisdiction, or greater, than the archbishop, by 1 *Eliz. cap. 1.* And Holt chief justice said, that the admitting of that point of the jurisdiction to be disputed, would be to admit the disputing of fundamentals, which the council of the other side attempt to subvert, not duly considering the respect due to the primate and metropolitan of England; for the archbishop of Canterbury has without doubt provincial jurisdiction over all his suffragan bishops, which he may exercise in what place of the province it shall please him; and it is not material to be in the *Arches*, no more

S. C. 12 Mod.

238 S. C. 1 Salk.

134.

Carth. 484. S. C.

Farr. 56, 117.

5 Mod. 433.

2 Barnard.

353.

2 Salk. 412.

672.

Will. Rep 32.

Ante 5. &c.

2 Stra. 1056.

3 Salk. 90.

13 Rep. 42.

Archbishop's jurisdiction over all the clergy.

Arche, what? more than any other place; for the *Arche* is only a peculiar, consisting of twelve parishes in *London*, exempt from the bishop of *London*, where the archbishop of *Canterbury* exercises his metropolitical jurisdiction; but he is not confined to exercise it there. And the citation is here, to appear before the archbishop himself, or his vicar general, who is an officer of whom the law takes notice; for the vicar general in the province is of the same nature as the chancellor in every particular diocese; and the dean of the *Arche* is the vicar general of the archbishop in all the province.

Then the counsel for the bishop of *St. Davids* urged, that the matters contained in the articles exhibited against the bishop before the archbishop were of temporal conusance, and not conusable before the archbishop. The first of which articles was, that the bishop of *St. Davids* being incumbent of the church of *Borough-green* in the county of *Cambridge*, covenanted with *William Brookes* for 200 *Guineas*, to make him his curate, and to resign to him his rectory, when he should be requested to do it. And *Sir William Williams*, *Sir Thomas Powys*, *Sir Bartholomew Shower*, and *Mr. Northey* argued, 1. This article imports only a contract made by the bishop as incumbent of the church of *Borough-green*, and not as bishop of *St. Davids*; and therefore admitting that fact to be *simony*, they ought not to bring it *per saltum* before the archbishop; but it should be begun in the court of the bishop of *Ely*, who hath *Cambridgeshire* in his diocese; for this method will deprive the bishop of his appeal. 2. That this fact amounts only to a temporal contract, and which is not of spiritual conusance; for no matter is alledged in this article to be executed, which amounts to *simony*; for he only took money to make a curate, which is lawful, and the covenant to resign was never executed; so that it could not be *simony* within the statute of *Elizabeth*, because there was not any resignation in pursuance of the covenant; and it is not *simony* within any of the canons which are in force in *England*. Besides, that since the statute of *Elizabeth* settles *simony*, it is a question, how far the King's Bench will permit the Spiritual courts to proceed and extend their notion of *simony*. Against which it was argued by the attorney general, serjeant *Wright*, and *Mr. Chesyre*, that as to the first objection, if a bishop makes a *simoniacal* contract, it is a personal offense in him, and contrary to his office of bishop, and is punishable by the metropolitan by the ecclesiastical censures. But if the archbishop had proceeded against the bishop of *St. Davids*, by depriving him of the benefice of *Borough-green*, the objection might have been good; for the bishop of the diocese might and ought to have proceeded against him for that purpose, and not the archbishop. But these proceedings are for an offense committed contrary to his duty as being a bishop. And of this opinion was

was the whole court. And as to the second objection they said, that though this was a contract, yet it is a *simoniacal* contract, and then it will be examinable in the Spiritual Court, not whether the contract ought to be performed or not, but to punish the party by ecclesiastical censures. This was proper before the statute of *Elizabeth*, and it is saved by the same act. It is without doubt *simony*, for it is a contract to resign a benefice for 200 *l.* for by the *Simony*. spiritual law the buying of chrism, &c. or any other thing *quae ad spiritualia spectat*, is *simony*. But the common law takes no notice of any *simony*, but that which the statute mentions; which statute has not defined *simony* in such manner as to say, what shall be *simony*, and what not, by the spiritual law. Then this fact, if it be *simony*, is conusable in the Spiritual Court, as before the statute of *Elizabeth*. And if it be not *simony*, and the archbishop shall adjudge it *simony*, that will be good cause of appeal, but not of prohibition. That *simony* was of ecclesiastical conusance before the statute, is without doubt. 2 canon of the council of *Chalcedon*, *Gen. Conc.* 397. If a bishop or churchman commit *simony*, he shall be degraded; if a layman, he shall be anathematized. 2 *Gen. Conc.* 110. The taking of money for orders or institution is *simony* by the council of *Chalcedon*. And by the 135 canon of the year 1603. it is *simony* to take any thing, where the usage does not warrant it; and it is *simony* to take more than the usage warrants, as more for visitations than the usage warrants. *Quod fuit concessum per totam curiam*. And per *Holt* chief justice, *simony* is an offense by the canon law, of which the common law does not take notice, to punish it; for there is not a word of *simony* in the statute of *Elizabeth*, but of buying and selling. Then it would be very unjust, if ecclesiastical persons might offend against their ecclesiastical duty in such instances, of which the common law cannot take notice to punish them, and yet the King's Bench should prohibit the Spiritual Court from inflicting punishment according to their law. The clergy are subject to a law different from that to which laymen are subject, for they are subject to obey the canons, for the convocation of the clergy may make laws to bind all the clerks, but not the lay people. And if the clergy do not conform themselves, it will be cause of deprivation. 2 *Cro.* 37. Resolved by all the judges of *England*. And by such authority were the canons of the year 1603 made, which make *simony* so great an offense. And the said canons have been always received, though some question has been made of the canons in 1640. And many of the ancient canons are as old as any law that we have at this time.

3 *Cro.* 788.
Baker v. Rogers.

Simony an offense by canon law.

Clergy subject to the canons.

Canons.

Then the counsel for the bishop of *St. Davids* said, that another article against the bishop was, that he took excessive fees for

Christening,
burials.

Procurations.

Ordination
without ten-
dring the
oaths.

Ordaining a
man under
age.

Bishop depri-
ved.

conferring orders, institutions, visitations, &c. and (by them) that amounts to extortion, and therefore it is punishable by indictment at common law; and the rather because they shew custom for the fees which they say the bishop ought to have taken, and that makes it without doubt conusable at common law, because the Spiritual Court cannot try, custom or not. But to that it was answered by the counsel of the other side, that these offenses in the Spiritual Court, and by the canon law are *simony*; for orders ought to be free, and so it is declared by the statute of *Elizabeth*. *Quod fuit concessum per totam curiam*. And per Holt chief justice, by the canon law, and of common right no parson ought to take any thing for *christening* of children, burials, &c. but by custom they are allowed to take something. And procurations are suable only in the Spiritual Court, and are merely an ecclesiastical duty; and it is a question, whether the taking more for them than ought to be taken, can be extortion at common law.

Then the counsel for the bishop said, that another article against him was, that he ordained a man, and did not administer to him the oaths according to the 1 *Will. & Mar.* and yet certified under his episcopal seal that he had taken the oaths, whereas he had not taken them; which is punishable by the statute 1 *Will. & Mar.* at common law, being a breach of the statute. But to that it was answered by the court, that the statute has made it now part of the office of a bishop, to tender the oaths upon ordination: And then the metropolitan may proceed against a bishop, if he does not obey the statute in this point, for proceeding contrary to his office of bishop. As if a statute appointed, that the judges should do any thing, and they refused; this would be a forfeiture of their office, and a *scire facias* would lie to repeal their patents, without previous conviction.

Then the counsel for the bishop argued, that another article against him was, that he had ordained a man under age; that the bishop made his defense and said, that the churchwardens of

had certified to him, that he was of full age; to which the promoter answered, that that certificate was forged; for the said churchwardens did not certify, and one of them could not write: so that this article imports forgery, and therefore examinable and punishable at common law. And since the act of uniformity has altered the law, they ought to proceed upon the said statute for ordaining under age. But the court said, that the distinction, which would answer almost all these objections, was this; that as to that which relates to the office of bishop, and is against his duty as a bishop, the Spiritual Court may proceed against him, to deprive him, but not punish him as for a temporal offense. See

Sir

Sir *John Savage's* case, *Keilw.* 194. and *5 Co. Caudrey's* case, where upon a special verdict found, it appeared, that *Caudrey* was deprived by the high commissioners, for preaching against the Common Prayer; and though there was other punishment appointed by the statute, and not deprivation until the second offense; yet it was held, that they might proceed by their own law, and deprive him; it being against the duty of his office as a minister, and they having power to purge their body of all scandalous members. And *per Holt* chief justice, as to customary fees, the matter of the custom is not in question, for then they ought to have laid a positive custom to take such a sum; which is not here, but only that he took more than the usual fees. But Suit upon a custom in the Spiritual Court. if a custom had been laid, it seemed to him, that a prohibition would not have lain; because it concerns meer ecclesiastical persons and rights, and therefore may be founded upon their ecclesiastical constitutions. And *per Gould* justice it appears, that the Extorsion in the Spiritual Court. Spiritual Court has jurisdiction in cases of extorsion in their officers and members by the statute of 31 *Edw. 2. cap. 4.* and 2 *Inst.* 586. where a bill was passed, to enable justices of peace to inquire of extorsions in the bishops and their officers; and there the bishops made protestations of their ancient rights, &c. And the case in 1 *Sid.* 217. 1 *Keb.* 721, 762. *Smallbrook v. Slader*, warrants the distinction taken before by the court. And (by him) in case of perjury, if it be committed in a cause of Perjury. which the Spiritual Court has consueance, as matrimony, &c. they shall proceed in the Spiritual Court to punish it; otherwise where it is committed in matter of contracts, &c. *Keilw.* 39. 2 *Hen.* 4. 10. And *per Holt* chief justice it has been a question, whether perjury in the Spiritual Court can be tried here; and in all the cases where it has been, the persons have been acquitted, and so it has been ended, but it is not yet settled.

Another article was for the abuse of the charity at *Brecknock*, and for putting out the schoolmaster there, &c. and for detaining a deed of exemplification, &c. And a prohibition was granted as to this article, but denied as to the rest. And afterwards the bishop was deprived before the archbishop, from which sentence he appealed to the delegates. *Post.* 539.

Whitgrave *vers.* Chancy. C. B.

S. C. Lutw.
180.
See now stat.
9 Ann. cap.
14.

IN an action brought for 80*l.* the defendant pleaded that he lost it to the plaintiff at play, and that at the same time he lost 40*l.* to J. S. at play; and then pleaded the statute of gaming, &c. The plaintiff demurred. And adjudged a good plea, since both the sums amount to more than 100*l.* and were lost at one sitting. *Contra*, if the 40*l.* had been lost by covin, to avoid the payment of the 80*l.* Adjudged in C. B. *Ex relatione m'ri Thornbill.*

Obstupavit.

CASE for stopping a watercourse. Not guilty pleaded. Verdict for the plaintiff. And it was moved in arrest of judgment, that it was *obstupavit et obstruxit* generally, without shewing how, as *per ripas*, &c. But it was over-ruled. And Gould justice said, that 3 Leon. 13. *obstupavit* generally was held good, but that it would be ill upon demurrer. Holt chief justice said, that he had known it held both ways. And the plaintiff had his judgment by the three judges, *Holt non contradicente.* *Ex relatione m'ri Jacob.*

Machin *vers.* Molton.

1. l. part. 534.

S. C. 12 Mod.
252.
Lutw. 1057.
S. C. 2 Salk.
549.
Carth. 476.
5 Mod. 450.
Prohibition
for citing out
of the diocese.
3 Salk. 90,
91.

2 Brownl. 12.

MR. Bridges moved for the discharge of a rule, by which a prohibition was granted *nisi*, &c. to the consistory court of the archbishop of York; where Molton rector of the church of South Collingham in Nottinghamshire preferred a libel against Machin for subtraction of tithes. And the motion for the prohibition was grounded upon a suggestion that Machin lived within the diocese of Lincoln, and therefore ought not to be cited out of the diocese where he lived, by 23 Hen. 8. cap. 9. And the cause that Mr. Bridges shewed to the court, to discharge the rule, was, because Machin had lands within the diocese of York, viz. in the parish of South Collingham in Nottinghamshire; for tithes of corn growing upon which lands Molton libelled in the consistory court of York; and when the citation was served, Machin was there, though he lived generally within the diocese of Lincoln. And he cited Dr. Blackmore's case, Hardr. 421. where it is said by the court, that if a man be cited within the diocese, though he is not an inhabitant there, but only comes there upon the account of trade or otherwise, that this is not within the statute of 23 Hen. 8. cap. 9. But serjeant Jenner for the prohibition cited 1 Roll. Rep. 328. *Moor v. Cockain and Saunderson*, where it is admitted, that if an executor living in the diocese of A. be sued and cited in the diocese of

of *B.* where the will was proved, a prohibition shall be granted. But *per Holt* chief justice, if *A.* lives in the diocese of *B.* and occupies lands in the diocese of *C.* if *A.* subtracts tithes in *C.* he may be cited and sued there; and it is not within the statute of *Hen. 8.* For when *A.* occupies lands in *C.* that makes him an inhabitant there, and out of the intent of the statute. And if a man has goods in the diocese of *A.* only, and he makes his will, and constitutes *B.* who lives in the Diocese of *C.* his executor, and dies; *B.* proves the will in the court of the bishop of *A.* *B.* may be cited in the diocese of *A.* for a legacy devised by this will, because the residence of the executor does not give conusance, but the probate of the will. To which *Rokeby* justice agreed. *Jenner* serjeant: The case in 1 *Roll. Rep.* 328. is *contra.* *Holt* chief justice: Then it has been over-ruled several times since. And though that statute was made to prevent vexation, yet there are several exceptions. *Adjournatur.*

And afterwards at another day Mr. *Bridges* against the prohibition argued, that if a prohibition should be granted, there would be a failure of justice, because *Molton* cannot maintain a suit in the court of the bishop of *Lincoln* for the subtraction of these tithes. And Mr. *Broderick* of the same side said, that the statute of 32 *H. 8. cap. 7.* which says, that persons withdrawing tithes shall be convened before the ordinary of the place where they were withdrawn, will amount to a repeal of 23 *Hen. 8. cap. 9.* if it had been within the intent of the said act, which he said was never intended. But *Jenner* serjeant cited 13 *Co. 6. Porter v. Rochester. Palm.* 488. *Hob.* 185. *Jones v. Jones. 1 Roll. Rep.* 328. And as to suits upon wills, they might transmit them to the diocese where the party lives. [See *Godb.* 191. *Frances v. Powell.*] And that civilians had told him, that they can sue a man in the spiritual court of the diocese where he resides for tithes which he ought to pay for lands in another diocese. But to that *Broderick* said, that a suit for tithes was local. And for that he cited 1 *Keb.* 481. *Rogers v. Harding.* But *per Holt* chief justice, the statute 32 *Hen. 8. cap. 7.* did not intend to repeal any part of 23 *Hen. 8. cap. 9.* But the question is here, whether there is any remedy in *Lincolnshire* for this subtraction of tithes within the diocese of *York*? The civil law courts may transmit any cause into another civil law court, and so they do every day for causes arising in the admiralty of *France.* But here the question is, whether the jurisdiction arose from the cause, or from the person? If a will be proved in the prerogative court of *Canterbury,* a suit upon it for a legacy, &c. must be in the *Arches,* which is the provincial court, though the party lives in another diocese. See the saving of the statute 23 *Hen. 8. cap. 9.* for that. *Adjournatur.* And afterwards a prohibition was granted,

to the end that the parties should declare upon it; so that the question might come more judicially before the court. *Post. 534.*

Dr. Groenvelt v. Dr. Burwell et al', censors of the college of Physicians.

Intr. Mich. 9 Will. 3. B. R. Rot. 178.

S. C. Comyns
76.
S. C. 1 Salk.
144, &c.
Carth. 421,
491.
1 Salk. 396.

Declaration
in trespass, af-
fault, battery,
wounding,
and imprison-
ment.

London ff. *Memorandum quod alias scilicet termino Paschae ultimo praeterito coram domino rege apud Westmonasterium venit Johannes Groenvelt in medicinis doctor per Thomam Prune attornatum suum et protulit hic in curia dicti domini regis tunc ibidem quandam billam suam versus Thomam Burwell Richardum Torles Willhelmum Dawes et Thomam Gill in medicinis doctores et Johannem Cole in Custodia marescalli, &c. de placito transgressionis insultus et imprisonamenti et sunt plegii de proseguendo scilicet Johannes Doe et Richardus Roe. Quae quidem billa sequitur in haec verba sc. Johannes Groenvelt in medicinis doctor queritur de Thoma Burwell Richardo Torles Willhelmo Dawes et Thoma Gill in medicinis doctoribus et Johanne Cole in custodia marescalli marescalciae domini regis coram ipso rege existentibus de eo quod ipsi iidem Thomas Burwell Richardus Torles Willhelmus Dawes Thomas Gill et Johannes Cole decimo quinto die Aprilis anno regni domini Willemi tertii nunc regis Angliae, &c. nono vi et armis, viz. gladiis baculis et cultellis in ipsum Johannem Groenvelt apud London praedictum, viz. in parochia beatae Mariae de arcubus in warda de Cheape insultum fecerunt et ipsum Johannem Groenvelt adtunc et ibidem verberaverunt vulneraverunt et maletractaverunt ita quod de vita ejus maxime desperabatur et ipsum Johannem Groenvelt adtunc et ibidem imprisonaverunt et ipsum sic in prisona per magnum tempus, viz. per spatium septem dierum extunc proxime sequentium sine aliqua rationabili causa contra voluntatem ipsius Johannis Groenvelt ac contra legem et consuetudines hujus regni Angliae ibidem detinuerunt et alia enormia ei adtunc et ibidem intulerunt contra pacem dicti domini regis nunc et ad damnum ipsius Johannis Groenvelt duarum mille librarum et inde producit sectam, &c.*

The defend-
ants plead,

Et modo ad hunc diem scilicet diem sabbati proxime post tres septimanas sancti Michaelis isto eodem termino usque quem diem praedicti Thomas Burwell Richardus Torles Willhelmus Dawes Thomas Gill et Johannes Cole habuerunt licentiam ad billam praedictam interloquendi et tunc ad respondendum, &c. coram domino rege apud Westmonasterium veniunt tam praedictus Johannes Groenvelt per attornatum suum praedictum quam praedicti Thomas Richardus Willhelmus Thomas et Johannes Cole per Richardum Swift attornatum suum et iidem

iidem Thomas Richardus Willelmus Thomas et Johannes Cole defendunt vim et injuriam quando, &c. Et quoad venire vi & armis seu quicquid quod est contra pacem dicti domini regis nunc necnon verberationem et vulnerationem praedictas superius fieri suppositas dicunt quod ipsi non sunt inde culpabiles. Et de hoc ponunt se super patriam et praedictus Johannes Groenvelt inde similiter, &c. Et quoad residuum transgressionis et imprisonamenti praedictorum superius fieri suppositorum iidem Thomas Richardus Willelmus Thomas et Johannes Cole dicunt quod praedictus Johannes Groenvelt actionem suam praedictam inde versus eos habere seu manutenere non debet. Quia dicunt quod jamdudum et diu ante praedictum tempus quo supponitur transgressionem et imprisonamentum praedicta fieri dominus Henricus nuper rex Angliae octavus per literas suas patentes sub magno sigillo suo Angliae sigillatas gerentes datum apud Westmonasterium vicesimo die Septembris anno regni sui decimo quas iidem Thomas Richardus Willelmus Thomas et Johannes Cole hic in curia proferunt recitando quod cum regii officii sui munus arbitrabatur, ditionis suae hominum felicitati omni ratione consulere, id autem vel imprimis fore, si improborum conatibus tempestive occurreret; apprime necessarium duxit, improborum quoque hominum, qui medicinam magis avaritiae suae causa quam ullius bonae conscientiae fiducia profitebantur, unde rudi et credulae plebi plurima incommoda oriantur, audaciam compescere, itaque partim bene institutarum civitatum in Italia et aliis multis nationibus exemplum imitatus, partim gravium virorum doctorum Johannis Chambre Thomae Linacre Ferdinandi de Victoria medicorum suorum Nicolai Halsewell Johannis Francisci et Roberti Yaxley medicorum ac praecipue reverendissimi in Christo patris ac domini domini Thomae titulo sanctae Ciceriliae trans Tiberim sacrosanctae Romanae ecclesiae presbyteri cardinalis Eboracensis archiepiscopi et regni sui Angliae cancellarii clarissimi precibus inclinatus, collegium perpetuum doctorum et gravium virorum, qui medicinam in urbe sua London et suburbiis intraque septem millia passuum ab ea urbe quaqua- versus publice eercerent, institui voluit atque imperavit, quibus tum sui honoris tum publicae utilitatis nomine curae ut speravit esset, malitiosorum quorum meminerit inscientiam temeritatemque tam exemplo gravitateque sua detertere, quam per leges suas nuper editas et per constitutiones per idem collegium condendas punire, quae quo facilius rite peragi potuissent, memoratis doctoribus Johanni Chambre Thomae Linacre Ferdinando de Victoria medicis suis Nicolao Halsewell Johanni Francisco et Roberto Yaxley medicis concessit, quod ipsi omnesque homines ejusdem facultatis de et in civitate praedicta essent in re et nomine unum corpus et communitas perpetua sive collegium perpetuum, et quod eadem communitas sive collegium singulis annis imperpetuum eligere possent et facere de illa communitate aliquem providum virum et in facultate medicinae expertum in praesidentem ejusdem collegii sive communitatis, ad supervidendum recognoscendum et

*As to the vi
et armis, bat-
tery, and
wounding,
not guilty.*

*And as to the
residue of the
trespass and
imprisonment
they plead.*

*The letters
patent of
Henry 8. in-
corporating
and erecting
the college of
physicians in
London.*

et gubernandum pro illo anno collegium sive communitatem praedictam et omnes homines ejusdem facultatis et negotia eorundem; et quod iidem praesidens et collegium sive communitas haberent successionem perpetuam et commune sigillum negotiis dictorum communitatis et praesidentis imperpetuum servitutum, et quod ipsi et successores sui imperpetuum essent personae habiles et capaces ad perquirendum et possidendum in feodo et perpetuitate terras et tenementa redditus et alias possessiones quas-
 cunque: Concessit etiam eis et successoribus suis pro se et haeredibus suis, quod ipsi et successores sui potuissent perquirere sibi et successoribus suis tam in dicta urbe quam extra terras et tenementa quaecunque annuum valorem duodecim librarum non excedentia, statuto de alienationibus ad manum mortuam non obstante; et quod ipsi per nomen praesidentis collegii seu communitatis facultatis medicinae London placitare et implacitari potuissent coram quibuscunque iudicibus in curiis et actionibus quibuscunque; et quod praedicti praesidens collegium sive communitas et eorum successores congregationes licitas et honestas de se-
 ipsis ac statuta et ordinationes pro salubri gubernatione supervisu et correctione collegii seu communitatis praedictae et omnium hominum eandem facultatem in dicta civitate seu per septem milliaria in circuitu ejusdem civitatis exercentium secundum necessitatis exigentiam quoties et quando opus fuerit facere valerent licite et impune sine impedimento dicti nuper regis haeredum vel successorum suorum justiciariorum eschaetorum vicecomitum et aliorum ballivorum vel ministrorum suorum haeredum vel successorum suorum quorumcunque: Concessit etiam eiisdem praesidenti et collegio seu communitati et successoribus suis, quod nemo in dicta civitate aut per septem milliaria in circuitu ejusdem exerceat dictam facultatem, nisi ad hoc per dictos praesidentem et communitatem seu successores eorum qui pro tempore fuerint admissus esset per ejusdem praesidentis et collegii literas sigillo suo communi sigillatas, sub poena centum solidorum pro quolibet mense quo non admissus eandem facultatem exercuerit, dimidio inde dicto domino regi et haeredibus suis, et dimidio dictis praesidenti et collegio applicando. Praeterea voluit et concessit pro se et successoribus suis quantum in se fuit, quod per praesidentem et collegium praedictae communitatis pro tempore existentes et eorum successores imperpetuum quatuor singulis annis per ipsos eligerentur, qui haberent supervisum et scrutinam correctionem et gubernationem omnium et singulorum dictae civitatis medicorum utentium facultate medicinae in eadem civitate ac aliorum medicorum forinsecorum quorumcunque facultatem illam medicinae aliquo modo frequentantium et utentium infra eandem civitatem suburbia ejusdem sive intra septem milliaria in circuitu ejusdem civitatis ac punitionem eorundem pro delictis suis in non bene exequendo faciendo et utendo illa, necnon supervisum et scrutinam omnium medicinarum et earum receptionis per dictos medicos seu aliquem eorum hujusmodi ligeis dicti nuper regis pro eorum infirmitatibus et hujusmodi curandis et sanandis dandarum imponendarum et utendarum quoties et quando
 opus

opus fuerit pro commodo et utilitate eorum ligearum dicti nuper regis; ita quod punitio hujusmodi medicorum utentium dicta facultate medicinae sic in praemissis delinquentium per fines amerciamenta et imprisonamentum corporum suorum et per alias vias rationabiles et congruas exequeretur: Voluit etiam et concessit pro se haeredibus et successoribus quantum in se fuit, quod nec praesidens nec aliquis de collegio praedicto medicorum nec successores sui nec eorum aliquis exercens facultatem illam quoquomodo in futurum infra civitatem suam praedictam et suburbia ejusdem seu alibi summonerentur aut ponerentur neque eorum aliquis summoneretur aut poneretur in aliquibus assis juratis inquestis inquisitionibus attinctis et aliis recognitionibus infra dictam civitatem et suburbia ejusdem imposterum coram majore et vicecomitibus seu coronatoribus dictae civitatis suae pro tempore existentibus capiendis, aut per aliquem officarium seu ministrum suum vel officarios sive ministros suos summonendis, licet eadem juratae inquisitiones seu recognitiones summonitae fuerint super brevi vel brevibus dicti nuper regis vel haeredum suorum de recto, sed quod dicti magistri sive gubernatores ac communitas facultatis antedictae et successores sui et eorum quilibet dictam facultatem exercens versus eundem nuper regem haeredes et successores suos ac versus majorem et vicecomites civitatis suae praedictae pro tempore existentes et quoscunque officarios et ministros suos forent inde quieti et penitus exonerati imperpetuum; prout per easdem literas patentes inter alia plenius apparet. Et iidem Thomas Richardus Willelmus Thomas et Johannes Cole ulterius dicunt, quod virtute literarum patentium praedicti Johannes Chambre Thomas Linacre Farnando de Victoria Nicolaus Halsewell Johannes Franciscus et Richardus Yaxley medici et omnes homines ejusdem facultatis in civitate praedicta fuerunt unum corpus et communitas perpetua sive collegium perpetuum; Posteaque per quendam actum in parlamento dicti nuper regis Henrici octavi apud Westmonasterium in comitatu Middlesex ultimo die Julii anno regni ejusdem nuper regis quintodecimo per prorogationem tento editum inter alia inactitatum fuit auctoritate ejusdem parlamenti, quod pro eo quod confectio praedictae corporationis fuit meritoria et valde bona pro republica hujus regni Angliae, et praeterea expediens et necessarium fuit, providere, quod nulla persona praedicti corporis politici et communitatis praedictae permetteretur exercere et practizare medicinam, Anglice practice physick, sed tantummodo tales personae quae essent profundae et modestae, Anglice sad and discreet, profunde literatae et maxime studiosae in arte medicinae, Anglice groundedly learned and deeply studied in physick, in consideratione cujus, et pro ulteriori auctoritate praedictarum literarum patentium, acetiam pro elargiamento ulteriorum articularum pro praedicta republica habendorum et fiendorum, per dictum nuper regem cum consensu dominorum spiritualium et temporalium et communium in eodem parlamento assemblatorum inactitatum existit inter alia, quod praedicta

corporatio praedictae communitalis facultatis medicinae praedictae et omnia et singula concessiones articuli et aliae res contenta et specificata in praedictis literis patentibus approbarentur concederentur ratificarentur et confirmarentur in eodem parlamento, et clare auctorizarentur et admitterentur per idem parliamentum bona legitima et valida, Anglice available, praedicto corpori incorporato et eorum successoribus imperpetuum, in tam amplo et largo modo prout poterit acceptari cogitari et construi per easdem literas patentes: Et ulterius inactitatum ordinatum et stabilitum existit per dictum actum, quod praedictae sex personae in praedictis literis patentibus nominatae ut principales et primae nominatae de praedicta communitate et societate eligerent eisdem duos alios ejusdem communitatis, qui ex tunc imposterum vocarentur et nominarentur electi, et quod praedicti electi annuatim eligerent unum eorundem fore praesidentem praedictae communitatis; et quoties aliqui loci praedictorum electorum contingerent fore vacui per mortem aut aliter, tunc superviventes praedictorum electorum infra triginta seu quadraginta dies proxime post mortem eorundem aut alicujus eorum eligerent nominarent et admitterent unum vel plures, prout necessitas requireret, de maxime eruditis et expertis hominibus de et in praedicta facultate in London, supplere, Anglice to supply, locum et numerum ceto personarum, ita quod ipse vel ipsi qui sic eligeretur vel eligerentur prius examinarentur vel examinarentur stricte per praedictos superviventes secundum formam devisatam per praedictos electos, ac etiam per praedictos superviventes approbaretur vel approbarentur, prout per eundem actum inter alia plenius apparet. Et iidem Thomas Richardus Wilhelmus Thomas et Johannes ulterius dicunt, quod postea et diu ante praedictum tempus quo, &c. per quendam alium actum in parlamento dominae Mariae nuper reginae Angliae vicesimo quarto die Octobris anno regni sui primo apud Westmonasterium tento editum inactitatum fuit auctoritate ejusdem parlamenti, quod praedictum statutum et actus parlamenti praerecitatum in omnibus articulis et clausulis in eodem contentis extunc imposterum starent et continuarent in pleno robore vi et effectum, aliquo statuto lege consuetudine aut re aliqua facto habito vel usitato in contrarium in aliquo non obstante: Et pro meliori reformatione diversorum enormium contingentium reipublicae per malum usum et indebitam administrationem medicinarum, Anglice physick, pro elargatione, Anglice, enlarging, ulteriorum articulorum, pro meliori executione rerum in praedicta concessione contentarum, per eundem actum in praedicto parlamento dictae nuper reginae factum ulterius inactitatum fuit, quod quandoque praesidens collegii aut communitalis facultatis medicinae London pro tempore existens, vel tales quos praedictus praesidens et collegium annuatim secundum tenorem et intentionem ejusdem actus auctorizarentur scrutare examinare corrigere et punire omnes offensores et transgressores in praedicta facultate infra praedictam civitatem et praecinctum in praedicto actu expressum, mitterent vel

committerent talem offensorem vel offensores pro ejus vel eorum offensa vel inobedientia, Anglice disobedience, contra aliquem articulum vel clausulum contentum in praedicta concessione vel statuto alicui guardae, Anglice ward, gaolae vel prisonae infra praedictam civitatem aut praecinctum praedictum (turri London excepto) quod tunc de tempore in tempus guardianus gaolator sive custos guardiani gaolatores sive custodes guardarum gaolarum et prisonarum infra civitatem aut praecinctum praedictum (excepto praexcepto) reciperet et reciperent in ejus vel eorum prisonas omnes et quemlibet talem personam et personas sic offendentes, qui sic mitteretur vel mitterentur sive committeretur vel committerentur ei vel eis ut praefertur, et ibidem salvo custodirent personam vel personas sic commissas in aliquibus prisonarum suarum ad propria custagia et onera praedictarum personarum vel personae sic commissarum sine ballio vel mancipatione, quousque tales offensor et offensores vel inobedientes, Anglice disobedients, exonerentur de praedicto imprisonamento per praedictos praesidentem et tales personas qui per praedictum collegium adinde auctorizarentur, sub poena quod quilibet talis guardianus gaolator vel custos in contrarium faciens perderet et forisfaceret duplice tales fines et amerciamenta qualia tales offensor et offensores aut inobedientes assessorerentur solvere per tales quales praedicti praesidens et collegium auctorizarent ut praefertur, ita quod idem finis et amerciamentum non esset ad aliquod tempus ultra summam viginti librarum, medietatem quam fore applicandam, Anglice to be employed, ad usum dictae nuper reginae haeredem et successorum suorum, alteram medietatem praesidenti et collegio, quibus omnibus forisfactis recuperandis per actionem debiti billam querelam vel informationem in aliquibus dictae nuper reginae haeredum vel successorum suorum curiis de recordo versus aliquem talem guardianum gaolatorem aut custodem sic delinquentem, in qua secta nullum essonum legis vadiatio vel protectio allocarentur nec admitterentur pro defendente: Et ulterius inactitatum fuit auctoritate ejusdem parlamenti, quod omnes justiciarii majores vicecomites ballivi constabularii et alii ministri et officarii infra civitatem et praecinctum praedicta super requisitionem eis fiendam adjuvarent auxiliarent et assisterent praesidenti praedicti collegii et omnibus personis per ipsos de tempore in tempus auctorizatis, pro debita executione praedicti actus vel statuti, sub poena pro non dando hujusmodi auxilium currere in contemptum dictae nuper reginae haeredum vel successorum suorum, prout per eundem actum inter alia plenius apparet. Et iidem Thomas Richardus Willelmus Thomas et Johannes Cole ulterius dicunt, quod praedictus Johannes Groenvelt per magnum tempus, scilicet per quinque annos ultimo praeteritos et amplius, infra civitatem London et circuitum septem milliarium ejusdem scilicet apud London praedictam in parochia et warda praedictis artem sive facultatem medicinae exercuit et utebatur et adhuc exercet et utitur; idemque Johannes artem sive facultatem illam sic exer-

cens et utens et se praetendens esse valde peritum in eadem ante praedictum tempus quo, &c. scilicet primo die Aprilis anno regni domini Gulielmi tertii nunc regis Angliae, &c. octavo, ibidem super se suscepit et assumpsit ad curandum et sanandum quandam Susannam Witball adtunc uxorem cujusdam Willelmi Witball de quadam infirmitate sive morbo dictae Susannae paullo post puerperium suum et occasione inde sicut supponebatur eveniente, unde ipsa laborabat et detinebatur, pro quadraginta solidis sibi dicto Johanni Groenvelt praemanibus solutis et aliis quadraginta solidis ei postea solvendis; Idem tamen Johannes Groenvelt curam suam adtunc et ibidem circa dictam Susannam adeo indiscrete male inartificialiter et imperite apposuit, et tales insalubres iniquas malas et perniciosissimas pillulas et noxia pharmaca ei adtunc et ibidem dedit et ministravit, quod eadem Susanna non solum minime sanata fuit, sed valde magis et egregie infirma et magnopere et periculose in corpore suo laesa devenit, et extunc hucusque extremo dolore inde laboravit, ac tristissima et miserrima conditione languebat, et adhuc sic inde laborat et languida existit insanabilis, ita quod de vita ejus desperabatur et adhuc desperatur occasione malae imperitae et perniciosae praxis ipsius Johannis Groenvelt in hac parte super corpus ejusdem Susannae commissae et perpetratae: Et iidem Thomas Richardus Willelmus Thomas et Johannes Cole ulterius dicunt, quod virtute literarum praedictarum patentium ac vigore statutorum praedictorum quidam Thomas Millington miles in medicinis doctor vir providus et in facultate medicinae expertus et adtunc unus de communitate collegii medicorum in London praedicti et unus adtunc octo electorum collegii sive communitatis praedictae adtunc existens ante praedictum tempus quo, &c. scilicet tricesimo die Septembris anno regni dicti domini regis nunc octavo apud collegium medicorum situat in parochia de Christchurch in warda de Farringdon infra London in praesidentem collegii sive communitatis praedictae debito modo electus et praefectus fuit, et in officio praesidentis collegii sive communitatis praedictae existens iidem praesidens et collegium praedictae communitatis eodem tricesimo die Septembris anno octavo supradicto apud collegium praedictum in parochia de Christchurch praedicta elegerunt ipsos Thomam Burwell Richardum Willelmum et Thomam Gill viros providos et in facultate medicinae expertos et adtunc de collegio praedicto existentes doctores fore quatuor censores sive gubernatores communitatis praedictae, ad supervidendum et scrutandum corrigendum et gubernandum omnes et singulos dictae civitatis medicos utentes facultate medicinae in eadem civitate ac alios medicos forinsecos quoscunque facultatem illam medicinae aliquo modo frequentantes et utentes infra eandem civitatem et suburbia ejusdem sive infra septem milliaria in circuitu ejusdem civitatis, ac ad puniendum eosdem pro delictis suis in non bene exequendo faciendo et utendo illa, necnon supervidendum et scrutandum eorum medicinas et eorum receptiones per dictos medicos seu aliquem eorum pro infirmitatibus hujusmodi

ligeorum dicti domini regis et hujusmodi curandis et sanandis dandas imponendas et utendas, quoties et quando opus fuerit et commodo et utilitati eorundem ligeorum, et ad puniendum eosdem medicos utentes dicta facultate medicinae in praemissis delinquentes per fines amerciamenta et imprisonamentum corporum suorum et per alias vias rationabiles et congruas secundum formam et effectum literarum patentium praedictarum et statutorum praedictorum; Qui quidem Thomas Richardus Willelmus et Thomas adtunc et ibidem officium illud super se susceperunt, et censores sive gubernatores collegii sive communitatis praedictae debito modo devenerunt, et sic usque praedictum tempus quo, &c. et postea continuaverunt et extiterunt; Et iidem Thomas Richardus Willelmus Thomas et Johannes Cole ulterius dicunt, quod postea et ante praedictum tempus quo, &c. scilicet quinto die Februarii anno regni domini regis nunc octavo, apud collegium medicorum in parochia de Christchurch in warda de Farringdon infra praedicta quaedam querimonia ex parte praedictorum Willelmi Withall et Susannae uxoris ejus facta et exhibita fuit eisdem Thomae Richardo Willelmo et Thomae adtunc censoribus sive gubernatoribus collegii praedicti ut praefertur existentibus versus praefatum Johannem Groenvelt pro praedicta indebita imperita mala et perniciose praxi super corpus praedictae Susannae per eundem Johannem Groenvelt sic ut praefertur facta et perpetrata; et superinde praedictus Johannes Groenvelt postea, scilicet eodem quinto die Februarii anno octavo supra dicto apud London praedictum in parochia beatae Mariae de arcubus in warda de Cheape praedicta, debito modo summonitus fuit per ipsos Thomam Richardum Willelmum et Thomam tunc censores sive gubernatores collegii praedicti ad comparendum coram eisdem censoribus sive gubernatoribus collegii praedicti apud collegium praedictum nono die Aprilis tunc proxime sequenti de et super praemissis examinandus et respondendum; quodque ante praedictum tempus quo, &c. scilicet eodem nono die Aprilis anno regni dicti domini regis nunc nono, coram praefatis Thoma Richardo Willelmo et Thoma adtunc censoribus sive gubernatoribus collegii praedicti ut praefertur existentibus apud collegium praedictum venit praedictus Johannes Groenvelt in propria persona sua, et praedicti censores sive gubernatores superinde adtunc et ibidem procedebant ad examinandum et inquirendum in materiam querimoniae praedictae, et super attestationem diversarum credibilium personarum adtunc praesentium veritatem querimoniae praedictae in praesentia ipsius Johannis Groenvelt affirmantium et super auditum ipsius Johannis Groenvelt et quicquid in sui ipsius defensione aut excusatione dicere potuit, et super considerationem totius materiae praedictae iidem Thomas Richardus Willelmus et Thomas censores sive gubernatores collegii praedicti sic ut praefertur existentes adtunc et ibidem virtute literarum patentium et statutorum praedictorum adjudicaverunt praedictum Johannem Groenvelt de indebita imperita et mala praxi praedicta fore culpabilem; et proinde

finem viginti librarum legalis monetae Angliae super ipsum Johannem Groenvelt adtunc et ibidem imposuerunt, et ulterius adjudicarunt, quod idem Johannes Groenvelt pro delicto suo praedicto committeretur gaolae dicti domini regis de Newgate in London, et haberet et subiret imprisonamentum in eadem gaola ad ejus propria onera et custagia sine ballio aut manucaptione per spatium duodecim septimanarum tunc proxime sequentium, nisi citius exoneraretur per praesidentem collegii praedicti et tales personas quae per collegium praedictum adinde legitime auctorizatae forent aut aliter per debitum legis cursum: quae quidem adjudicatio censorum sive gubernatorum illorum in scriptis posita et recordata fuit, ac penes ipsos censes sive gubernatores jam remanet minime adnullata sed in pleno vigore existit: Et praedicti Thomas Richardus Willelmus Thomas et Johannes Cole ulterius dicunt, quod iidem Thomas Richardus Willelmus et Thomas, ea intentione ut executio judicii sive adjudicationis praedictae fieret, virtute literarum patentium ac statutorum praedictorum adtunc et ibidem per quoddam praeceptum sive warrantum suum in scriptis, recitando querimoniam et iudicium sive adjudicationem praedictam ad largum, sub manibus et sigillis suis eidem Johanni Cole ministro suo ad hujusmodi praecepta sua exequenda existenti mandaverunt, quod ipse corpus praefati Johannis Groenvelt caperet, et ipsum custodi gaolae de Newgate praedictae deliberaret, ibidem remansurum sine ballio aut manucaptione per spatium praedictum duodecim septimanarum, nisi citius per praesidentem collegii praedicti et tales personas quales per collegium praedictum auctorizatae forent et aliter per debitum legis cursum deliberatus foret; virtute cujus warranti praedictus Johannes Cole praedicto tempore quo, &c. apud London praedictum in parochia beatae Mariae de arcubus in warda de Cheape praedicta praefatum Johannem Groenvelt cepit, et eundem simul cum warranto praedicto sub manibus et sigillis eorundem quatuor censorum praemissa specificante custodi gaolae praedictae adtunc deliberavit, ibidem in forma praedicta detinendum; prout ei bene licuit; idemque Johannes Groenvelt superinde in prisona ibidem per tempus praedictum in narratione praedicta mentionatum detentus fuit: Quae quidem captio imprisonamentum et in prisona detentio praedicta praedicti Johannis Groenvelt in forma praedicta et ex causa praedicta facta sunt idem residuum transgressionis et imprisonamenti praedicti unde praedictus Johannes Groenvelt se modo queritur: Et hoc parati sunt verificare: Unde petunt iudicium, si praedictus Johannes Groenvelt actionem suam praedictam inde versus eos habere seu manutenere debeat, &c.

B. Shower
Law. Agar
Jo. Keene.

Et praedictus Johannes Groenvelt dicit, quod ipse per aliqua per Replication.
praedictos Thomam Burwell Richardum Torles Wilhelum Dawes
Thomam Gill et Johannem Cole superius placitando allegata ab acti-
one sua praedicta quoad residuum transgressionis imprisonamenti et in
prisona detentionis praedictum versus eos habenda praeccludi non de-
bet; quia dicit, quod bene et verum est, quod ipse idem Johannes
Groenvelt per magnum tempus, scilicet per quinque annos proxime
ante exhibitionem billae ipsius Johannis Groenvelt praedictae, fuit et
ad hoc est medicinae doctor, et artem sive facultatem medicinae per
totum tempus praedictum infra civitatem London praedictam et cir-
cuitum septem milliarium ejusdem exercuit et utebatur, prout ipsi prae-
dicti Thomas Burwell Richardus Torles Wilhelmus Dawes Thomas Gill
et Johannes Cole superius placitando allegaverunt; sed idem Johannes
Groenvelt protestando quod dominus Henricus nuper rex Angliae non
concessit per aliquales literas patentes quales iidem Thomas Burwell
Richardus Torles Wilhelmus Dawes Thomas Gill et Johannes Cole
superius placitando allegaverunt, Protestandoque etiam quod non ha-
betur aliquod tale recordum actus parliamenti dicti nuper regis Hen-
rici octavi quale ipsi iidem Thomas Burwell Richardus Torles Wil-
helmus Dawes Thomas Gill et Johannis Cole superius placitando simi-
liter allegaverunt, Protestandoque etiam quod ipse idem Johannes
Groenvelt curam suam circa dictam Susannam Withall in praedicto
placito ipsorum Thomae Burwell Richardi Torles Wilhelmi Dawes
Thomae Gill et Johannis Cole nominatam non indiscrete male inarti-
ficialiter vel imperite apposuit nec aliquas insalubres iniquas malas vel
perniciosissimas pillulas vel noxia pharmaca ei dedit vel administra-
vit, prout iidem Thomas Burwell Richardus Torles Wilhelmus Dawes
Thomas Gill et Johannes Cole per placitum suum praedictum superius
allegaverunt, Protestandoque etiam quod nulla querimonia ex parte
praedictorum Wilhelmi Withall et Susannae uxoris ejus facta vel exhi-
bita fuit eisdem Thomae Richardo Wilhelmo et Thomae Gill versus ip-
sum Johannem Groenvelt pro indebita imperita mala vel perniciose
praxi super corpus praedictae Susannae per eundem Johannem Groen-
velt fieri et perpetrari supposita, prout ipsi iidem Thomas Richardus
Wilhelmus Thomas et Johannes Cole superius placitando allegaverunt,
quodque nullum tale iudicium sive adjudicatio praedictorum Thomae
Richardi Wilhelmi et Thomae redditum fuit contra ipsum Johan-
nem Groenvelt quale ipsi iidem Thomas Richardus Wilhelmus Thomas
et Johannes Cole per placitum suum praedictum superius allegave-
runt; Pro placito idem Johannes Groenvelt replicando dicit, quod
ipsi praedicti Thomas Burwell Richardus Torles Wilhelmus Dawes
Thomas Gill et Johannes Cole de injuria sua propria in ipsum Jo-
hannem Groenvelt insultum fecerunt et ipsum maletractaverunt im-
prisonaverunt et per praedictam spatium septem dierum in prisona
detinuerunt, modo et forma prout praedictus Johannes Groenvelt su-
perius

perius versus eos narravit, Et non virtute warranti eidem Johanni Cole per placitum praedictum superius suppositi fore facti; Et hoc petit quod inquiretur per patriam.

Nath. Wright
Jo. Girdler
Ed. Northey.

Demurser.

Et praedicti Thomas Richardus Willelmus Thomas et Johannes Cole dicunt, quod praedictum placitum praedicti Johannis Groenvelt modo et forma praedictis superius replicando placitatum materiaque in eodem contenta minus sufficientia in lege existunt, ad eundem Johannem Groenvelt ad actionem suam praedictam inde versus ipsos Thomam Richardum Willelmum Thomam et Johannem Cole habendam manutenendum, ad quod quidem placitum sive replicationem dicti Johannis Groenvelt modo et forma praedictis placitatum iidem Thomas Richardus Willelmus Thomas et Johannes Cole necesse non habent nec per legem terrae tenentur aliquo modo respondere; Et hoc parati sunt verificare; Unde pro defectu sufficientis replicationis praedicti Johannis Groenvelt in hac parte iidem Thomas Richardus Willelmus Thomas et Johannes Cole ut prius petunt iudicium, et quod praedictus Johannes Groenvelt ab actione sua praedicta inde versus ipsos Thomam Richardum Willelmum Thomam et Johannem Cole habenda praeccludatur, &c. Et pro causis hujus morationis in lege super replicationem praedictam iidem Thomas Richardus Willelmus Thomas et Johannes Cole ostendunt curiae hic et dicunt, quod ubi praedictus Johannes Groenvelt in dicta replicatione sua dicit inter alia, quod bene et verum est quod ipse per magnum tempus scilicet praedictos quinque annos, &c. fuit et adhuc est medicinae doctor, &c. prout ipsi praedicti Thomas Richardus Willelmus Thomas et Johannes Cole superius placitando allegaverunt, satis et manifeste liquet et constat curiae hic, quod in placito ipsorum Thomae Richardi Willelmi Thomae et Johannis Cole praedicto non allegatur, sed ipsi tantum allegaverunt inde, quod praedictus Johannes Groenvelt artem sive facultatem medicinae per tempus illud exercuit et utebatur et adhuc exercet et utitur, se pretendens esse valde peritum in eadem; quae allegatio multum differt ab illa quam praedictus Johannes Groenvelt per eandem replicationem suam supponit ipsos fecisse: Quodque protestationes praedicti Johannis Groenvelt sunt vanae supervacuae et omnino superfluae, ac prima earum est sententia imperfecta et in sensu deficiens, et secunda earum protestationum est negativa praegnans ambigua et incerta; Quodque ac praecipue praedictus Johannes Groenvelt traversat virtutem warranti praedicti, quae non est traversabilis, existens validitas ac materia legis, ubi traversare debet confectionem vel existentiam ejusdem warranti, seu deliberationem inde dicto Johanni Cole, &c. Ulterius praedictus Johannes Groenvelt traversat sive negat, quod iidem Thomas Richardus Willelmus Thomas et Johannes Cole, scilicet omnes eorum,

virtute

virtute warranti praedicti dictum Johannem imprisonaverunt, &c. et hoc in exitum offert ubi ipsi superius allegaverunt eundem Johannem Cole solum virtute warranti illius dictum Johannem Groenvelt cepisse et in prisonam deliberasse, ac ipsos Thomam Richardum Willelmum et Thomam warrantum illud ei fecisse: Acetiam dicta traversia caret forma pro defectu verborum istorum scilicet [absque hoc] vel [absque tali causa] quae in hujusmodi traversiis imponi solent et debent.

Et praedictus Johannes Groenvelt dicit, quod placitum praedictum per ipsum Johannem Groenvelt modo et forma praedictis superius replicando placitatum materiaque in eodem contenta bona et sufficientia in lege existunt, ad actionem ipsius Johannis Groenvelt praedictam versus ipsos Thomam Richardum Willelmum Thomam et Johannem Cole habendam manutenendum; quod quidem placitum materiamque in eodem contentam idem Johannes Groenvelt paratus est verificare et probare prout curia, &c. Et quia praedicti Thomas Richardus Willelmus Thomas et Johannes Cole ad replicationem illam non respondent, nec illam hucusque aliququaliter deducunt, idem Johannes Groenvelt petit iudicium, et damna sua occasione transgressionis insultus et imprisonamenti praedictorum sibi adjudicari. Sed quia curia domini regis nunc de iudicio suo de et super praemissis reddendo nondum advisatur, dies inde datus est partibus praedictis, &c.

Joinder in demurrer.

This case was several times argued at the bar by Mr. Robert Eyre, Mr. serjeant Darnall, &c. for the plaintiff; and by Sir Bartholomew Shower, Mr. serjeant Levinz, &c. for the defendants. And now in Trinity term 12 Will. 3. Holt chief justice delivered the opinion of the court, that judgment ought to be entred for the defendants. And at the beginning he said, that though it had been argued that the replication was good, yet they all held the contrary; for it is ill, as well in matter as in form. The defendants in their plea shew that a warrant was granted, and that by virtue thereof the plaintiff was arrested and imprisoned; to which the plaintiff does not make any answer, that there was not such warrant, nor traverses it, but only says that he was not arrested by virtue of it. If he had denied that there was any such warrant, it had been a good traverse; for then Cole would not have had authority to have arrested the plaintiff. But if the plaintiff was arrested for any other cause, and not upon this warrant, then the plaintiff should have shewn the other cause. As suppose there were two warrants, the one good and the other ill, and the plaintiff had been arrested upon the ill warrant; he ought to shew it specially. But if Cole had a good warrant at the time of the arrest, though he had declared that he had arrested

Traverse of an arrest virtute warranti praedicti, is ill. Post. 1046.

Distress taken
for one cause,
the avowry
may be for
another.

the plaintiff upon the warrant that was insufficient; yet in an action brought against *Cole* he might have justified under the good warrant, having had it in his custody at the time of the arrest: For the single question would be, whether he had good authority at the time of the arrest? And this is like the case in 34 *Edw. 1. Fitzb. avowry* 232. cited in 3 *Co. 26. a.* that if a man distrains for one thing, yet in his avowry he may avow the taking for what he pleases. As if a man distrains his tenant for that which he cannot justify, but at the same time rent is arrear; he may avow for the rent arrear, and is not obliged to avow for that for which he took the distress, nor can the plaintiff in replevin traverse the taking for the rent arrear, but can only plead in bar to the avowry, *riens arrear*. So here, the plaintiff cannot say, that *Cole* did not take him by virtue of the good warrant; for if he had such warrant in his custody at the time of the arrest, he was arrested by it. And the traverse is an ill traverse in this manner. But the plaintiff should have traversed, that there was any such warrant; or he might have said, that it was granted afterwards, *absque hoc* that there was any such warrant at the time of the arrest. Therefore the replication is ill; and then the question will be, whether the plea in bar is good? And they all held that it was.

The exceptions that were taken to this plea by the plaintiff's council were several; but those upon which they seemed principally to insist, are four.

1. That the plea is uncertain, so that the defendants have not intitled themselves to a sufficient jurisdiction.
2. That admitting that the defendants have intitled themselves to a sufficient jurisdiction, yet they have exceeded their jurisdiction, by imposing a fine, and imprisonment also: For though they might have committed the plaintiff in execution for the fine, yet they could not impose both a fine and imprisonment as a punishment.
3. That there is no answer to the assault, and therefore the plea is ill.
4. That it does not appear that the plaintiff is a member of the college; and the defendants have not authority to punish others.

As to the first exception, which is the only objection material, *Holt* chief justice said, that the defendants have intitled themselves to a sufficient jurisdiction. For, 1. They have jurisdiction over the person of the plaintiff, since he practised physick in *London*. 2. Over the subject matter, *viz.* the unskilful administration of physick.

physick. 3. The fact for which the plaintiff was punished, was committed within the limits of their jurisdiction, viz. in London. Then where a man has jurisdiction in all these particulars over another man, it is apparent, that whether the matter of fact be such as it is adjudged or not, it is not traversable; but the plaintiff is concluded, and shall not falsify the judgment. But it is objected, that though the matter is within the defendants jurisdiction, yet it is not certainly alleged; whereas by the opinion of Coke, 8 Rep. 121. it ought to be certainly alleged, so that issue may be taken upon it, it being traversable. And that is the reason why it shall be traversable, because the party grieved has no remedy by error or attainder.

But Holt chief justice answered, that he was of a contrary opinion, viz. that it was not traversable. And, 1. he said, that a man convicted by the defendants in pursuance of their judicial authority cannot traverse the fact of which he is convicted. 2. If he could, yet the fact is certainly enough alleged here. 3. Though there were a defect in the conviction, yet that would not intitle the plaintiff to an action against the defendants, being the censors, &c. And, 1. that the fact of which the plaintiff is convicted, is not traversable; because the authority of the defendants is absolute, to hear and determine the offense; and when in pursuance of the said authority they have adjudged the plaintiff guilty, he cannot arraign their judgment, but is concluded: for persons who are judges by law, shall not be liable to have their judgments examined in actions brought against them. 45 Edw. 3. 17. 9 Edw. 4. 3. 12 Co. 24, 25. Now it is plain, that the censors have judicial power. It is true, that some persons have power to commit, who are not judges; as the constable may commit for an affray committed in his presence; and he is liable to an action, if the fact is false. The difference is, that he does not commit for punishment, but for safe custody. So commissioners of bankrupts may commit a man for refusing to be examined concerning the estate of the bankrupt; but they are not judges; and their proceedings are traversable, because their power of imprisonment is only *quosque*, &c. But where a man has power to inflict imprisonment upon another for punishment of his offense, there he hath judicial authority. 2. To consider the particulars of their power. It extends to all physicians practising within London, or seven miles round; and it is, to examine, hear, convict, and punish them, for any ill practice committed by them; which are all the essentials that create a judge. 3. The censors are justices of record, and that which they do is matter of record. For where there is a jurisdiction erected *de novo* with power to fine and imprison, it is a court of record; for courts of record only can fine. 8 Co. 38. b. and 8 Co. 60. b. in point. Therefore it is resolved, that

Judgment by the censors of the college of Physicians, that a man is guilty of ill practice, is not traversable.

Courts which can fine are of record.

Judges not
liable to ac-
tions or in-
dictments for
false judg-
ments given.

that in recaption in the Common Pleas, and judgment against the defendant, he shall be fined and imprisoned. But in the same case, if the writ is *vicontiel*, he shall be only amerced. And for a full authority he cited 10 Co. 103. where it was held, that in debt at common law for the arrears of an account before auditors the defendant might wage his law; and therefore since there is no statute, which by express words takes away wager of law in such case, the question is, why it does not lie? and there it is resolved, that *Westm. 2. cap. 11.* (which enacts, that where the lord assigns auditors to his bailiff, and he is found in arrear, the auditors shall commit to prison) giving power to the auditors to commit the defendant to prison, does thereby make them justices of record, forasmuch as none but such can imprison; and therefore their judgment cannot be traversed, and for that reason the defendant is ousted of his law. 2 *Inst.* 380. Then if auditors assigned by the lord to his bailiff are justices of record, *a fortiori* the censors are such, having a much larger jurisdiction; and then consequently no act of theirs can be traversed. Nor can it be assigned for error, that judges did that which they ought not; as that they entered a verdict for the defendant, where the jury gave it for the plaintiff. 47 *Ed.* 3. 50. 1 *Hen.* 6. 4. 12 *Co.* 24. *Dier* 89. b. And as a judge shall not be questioned at the suit of the parties, no more shall he be questioned at the King's suit before another judge. 27 *Affis.* 18. Where *A.* was indicted at the King's suit, for that, that he was justice of *oyer* and *terminer*, and several persons were indicted before him of a trespass, and be made an entry upon the record, that they were indicted of felony; and judgment was demanded, if he should answer, since he was a judge by commission, which is of record; and that presentment would defeat the record, which is to aver against that which he did as judge of record; and the indictment was held void. Objection. The opinion of *Coke*, 8 *Co.* 121. that the cause of the fine and imprisonment is traversable. *Holt* chief justice answered, that it is an opinion *obiter*, and not pertinent to the case there; because *Dr. Bonham* was committed for practising without licence, and not for male practice; and the power of commitment does not extend to practising without licence, nor can they inflict the said punishment for such offense. But *Coke* enlarges upon their power, and includes a commitment for male practice. But *Coke* was transported, that the doctor was a member of the university, and of his university (as one may see by his excursions in praise of it) which he looked upon as affronted by that prosecution. And as the said opinion was not judicial, so it has not any authority in law for its foundation. *Coke* himself says, that they ought to make a record of their proceedings; then they are judges of record, and therefore according to himself, 12 *Co.* 24. their acts are not traversable. Objection: That the party has no remedy, neither

neither by writ of error, nor otherwise. Answer: That he hath a remedy as good as a writ of error. 2. Admit that he hath not, yet that will not intitle him to a traverse. 1. He agreed that the plaintiff cannot have a writ of error, because it is a court newly instituted, impowered to proceed by methods unknown to the common law; as there is no need to have an indictment, or such formal judgment, as in other cases; as there is no need to say, *ideo consideratum*, &c. but only *quod solvat*, &c. He compared it to convictions before justices of peace out of sessions, upon which though error does not lie, yet a *certiorari* lies; for it is a consequence of all jurisdictions, to have their proceedings returned here by *certiorari*, Cro. El. 489. Long's case, to be examined here. There a *certiorari* was awarded, to remove an indictment for felony, where the party convicted was burnt in the hand, but no judgment given, so that he could not have a writ of error. Where any court is erected by statute, a *certiorari* lies to it; so that if they perform not their duty, the King's Bench will grant a *mandamus*. There was a mistake made by the commissioners of sewers, grounded upon this, that where the 23 Hen. 8. cap. 5. says, that the commissioners in several cases there mentioned shall certify their proceedings into Chancery; afterwards by 13 Eliz. cap. 9. it is enacted, that thereafter the commissioners shall not be compelled to certify or return their proceedings; which they interpreted to extend to a *certiorari*; and thereupon they refused to obey the *certiorari*, but they were all committed: and yet the statute does not give authority to this court to grant a *certiorari*, but it is by the common law that this court will examine, if other courts exceed their jurisdictions. So a *certiorari* lies upon a conviction of forcible entry, upon the view of a justice of peace. And there is no reason, that this case should be different from all others. In this case the plaintiff moved for a *certiorari* after the action brought, but the King's Bench did not think proper to help him in his action; and that is the reason why it was denied. 2. If no *certiorari* lay, it does not follow, that because their proceedings are not examinable, that therefore they are not a court of record; for their jurisdiction is not diminished, because there is no appeal from it; but it is the stronger, because so great a trust is reposed in them. So that the force of the argument must be, that because no appeal lies from them, there is the less reason, that their proceedings should be traversable. And that this is no ground for a traverse, appears by many precedents. As if in a criminal case the jury gave a hard verdict, no attain lies; nor is the judge punishable, if by misdirection the jury give an ill verdict. In 12 Co. 23. it appears to be the law of the *Star-chamber*, that if the party was acquitted against plain proof, the judge and jury should be fined; but that is now exploded, and fol. 24, 25. *Nudigate's* case

Error does not lie upon a judgment given by the censors.

Certiorari lies.

No attain in criminal cases.

A jury is not
finable, who
give a verdict
contrary to
evidence.

Presentment
in a court-leet
is traversable.

Error does not
lie upon an
order made by
justices of oyer
and terminer
to fine a jury.

case is contrary. That juries have been fined, appears by *Moor* 730. 2 *Leon.* 132. *Noy* 48. *Yelv.* 23. but all those cases are answered in *Busshel's* case in *Vaugh.* 135. And it was resolved by all the judges of *England* (except *Kelynge* chief justice) that juries were not finable, for giving verdict against evidence. In *Cro. Eliz.* 309. it was held, that if the jury find according to the direction of the judge in matter of law, although he be mistaken, the jury shall not be liable to attain; and the misdirection of the judge cannot be assigned for error; so that the party is without remedy, against whom the verdict is found, and yet he is concluded by the verdict, to say that it is not true. Objection, That there is not any jury here. Answer. That will not distinguish the case; for in 7 *Hen.* 6. 13. it is said, that *finis finem litibus imponit*, and the cause for which it was set is not traversable. A presentment in a court-leet is traversable, but no action lies against the steward, for awarding process upon it. Such presentment is traversable in replevin, not in trespass, nor in an action against the judge. But where a fine is imposed, the matter for which, &c. is not traversable. For where the power vested by the law in the jury is transferred to the judge; why the party should rather have his traverse to the condemnation of the judge, than to the verdict of the jury, who find him guilty, there is no reason. And consequently by this statute the original power of the jury at common law being vested in the censors, it is equally peremptory. *Pasch.* 29 *Car.* 2. *Hamond v. Howell.* 1 *Mod.* 184. 2 *Mod.* 218. *Hamond* being one of the jury with *Busshel*, was fined and imprisoned for not finding *Pen* and *Mead* guilty of a riot; and after that judgment was given in the Common Pleas, that the fine was illegal, and *Busshel* was discharged, *Hamond* brought an action of false imprisonment against Sir *John Howell* recorder of *London*. The defendant in his plea shewed the proceedings before the commissioners of oyer and terminer, that *Pen* and *Mead* were indicted, and pleaded not guilty, that the jury found them not guilty against plain evidence and the direction of the court in matter of law; that the defendant was one of the jury, and fined forty marks, and committed in execution for his fine; the plaintiff replied, *de son tort demesne, absque hoc* that they found against evidence: and it was held, that the action did not lie; because the defendant being recorder, was in the commission of oyer and terminer, and judge of record. And the present case does not differ from the said case; for here the censors have jurisdiction over the plaintiff and his profession, as the recorder had there; and the particular fact was within *London* within the limits of their jurisdiction. And in *Howell's* case it was admitted, that a writ of error would not lie upon the order for imposing the fine, but that was not esteemed a sufficient ground to maintain the action. Objection. *Hardr.* 480. *Terry v. Hun-*

Huntington. Where in trover for goods levied by warrant of the commissioners of excise, the question was upon the whole matter apparent upon the special verdict, that the commissioners had adjudged low wines to be strong waters, whether an action would lie against the officer; and it was held that it would; because they had exceeded their jurisdiction, no duty being imposed upon low wines. But here the subject matter and the person are under the jurisdiction of the censors. As if two justices adjudge *A.* to be the father of a bastard; if the child is a bastard, *A.* is concluded by the judgment of the justices, and cannot falsify it, and say that he is not the father; but his only remedy is by appeal: but if the child was born in wedlock, then the judgment was *coram non judice* and void, and consequently no person concluded by it. But it is admitted in the said case, that if the commissioners had had jurisdiction of the cause, though they had given a wrong judgment, as if they had adjudged small beer to be strong, their judgment could not have been examined in an action. Objection. 1 *Cro.* 394.

Nicholls v. Walker. Where upon a special verdict in trespass the case was, that a parish in reputation, which had all parochial rights a long time before and at the making of the 43 *Eliz. cap. 2.* was rated to the poor of another parish, and the said rate was confirmed by two justices, and for refusing to pay, the overseers by virtue of a warrant of two justices distrained; and judgment was given for the plaintiff, because it was a distinct parish as to the 43 *Eliz. cap. 2.* and if the inhabitants of one parish make a rate upon the inhabitants of another parish, for maintaining the poor of the first parish; the inhabitants have exceeded their authority, and it is an illegal tax, and the justices have no power to confirm such rate (unless it be in case of contribution by the one parish to the poor of the other, which was not the case there) and so there was no ground for the warrant of the justices for the distress, for their jurisdiction is only in case of rates well assessed. 2. Admit that this conviction was traversable, yet the plea is certain enough. It is shewn, that the plaintiff gave the woman such unsound medicines and noxious drugs, that she became worse. Now suppose this fact might be traversed, there is no defect in the plea; for if it had been laid more particularly, it must have been tried by a jury at last; for the judges do not understand medicines sufficiently to make a judgment, whether they were sound or not; and therefore it is enough to aver generally, that they were unsound and noxious drugs. As in case against a physician it is sufficient to say, that he administered physick unskilfully, &c. without shewing the particular defect in his skill. There is another objection, that it is not shewn, under what distemper the wife laboured. Answer. That if she had not any distemper, the plaintiff's case is the worse, for then he should not have administered physick. As if a splenetick person

Who may administer an oath?

person comes to a physician, when in fact he is well, it would be a fault in the doctor to administer physick to him. There is another objection, that the witnesses were not examined upon oath. And by *Holt* chief justice, where judicial power is given to persons by statute, they may by consequence of law administer an oath; but to that, he said, he would not give a positive opinion. But admitting that they might have administered an oath, the omission of it is but error in the proceedings, and does not make the judgment void; like the case of the *Marshalsea*, 10 Co. 76. where one process is issued instead of another.

As to the second objection, that they have fined the plaintiff, and imprisoned him also; it is answered by the words of the letters patents, which give power to do it; and so do the justices in many cases at common law.

As to the third objection, it is well enough. For as to the *vi et armis*, battery, and wounding, they plead not guilty; and as to the residue, &c. which includes the assault, &c. they justify.

As to the fourth objection, that it does not appear, that the doctor was a member of their body; he answered, that if he was a practiser of physick in *London*, as he has admitted himself to be, the censors have sufficient authority over him, whether he be of their body or not, by the express words of the letters patent. And for these reasons they all held the plea to be good. And judgment was given for the defendants.

College of physicians *vers.* Levett.

A graduate doctor of *Oxford* cannot practise physick within *London*, or seven miles, without licence.

Post. 680.
Ante 153.

THE plaintiffs brought debt against the defendant for 25 *l.* for having practised physick within *London* five months without licence. Upon *nil debet* pleaded, it was tried before *Holt* chief justice of the King's Bench in *London* at *Guildhall* on *Tuesday* the eighteenth of *November* 1701, in *Michaelmas* term 10 *Will.* 3. And the defendant's defense was, that he was a graduate doctor of *Oxford*. But it was ruled by *Holt*, upon consideration of all the statutes concerning this matter, that he could not practise within *London*, or seven miles round, without licence of the college of physicians. And by his direction a verdict was given for the plaintiffs.

Adjudged accordingly on a special verdict *Mich.* 4 *Geo.* 1. *B. R.* 1717. *College of Physicians vers. Dr. West*, who was a graduate of *Oxford*.

Trin. Term

11 Will. 3. B. R. 1699.

Sir John Holt *Chief Justice.*

Sir Thomas Rokeby

Sir John Turton

Sir Henry Gould

} *Justices.*

Wiggon *vers.* Branthwait.

TRespass for taking of goods. The case was thus. The S. C. Cases in
 abbot of *Bromball* was seised in fee in right of his mona- B. R. 259.
 stery of the manor of *Bromball*, and he and all those Holt 758.
 whose estate he had, had time whereof, &c. had wreck Grant.
 of the sea. The manor by the dissolution of the monasteries came S. C. 12 Mod.
 to *Henry VIII.* by which means the wreck being a royal franchise 260.
 was vested in him *in jure coronae*. And he being so seised, grant- 12 Mod.
 ed the office of lord high admiral of *England* to the viscount *Lisle*, 5 Rep. 106.
 with all wrecks of the sea and all other profits to the said office 2 Inst. 167.
 appertaining. And afterwards he granted the manor, &c. to *B.* 168.
 under whom the plaintiff in the action claims. But because that Vaugh. 164.
 (as the defendant's counsel urged) the wreck being granted to the 3 Lev. 85, 307.
 lord *Lisle* before, and not recited in the grant to *B.* it did not pass 6 Mod. 149.
 by the King's grant to the patentee; therefore they seised the goods Bro. Wreck, p.
 for the King. But *Holt* chief justice over-ruled this matter upon 1.
 the evidence at the trial in *Suffolk*. Because the wreck appertaining F. N. B. 91.
 to the manor by prescription, could not pass, as appertaining to (D.)
 the office of lord high admiral, to the lord *Lisle*. And it being Bro. de Son
 moved, that it might be found specially, he refused. And there- Tort, p. 38.
 fore Mr. *Whitaker* tendered a bill of exceptions which was sealed, Bro. Prescrip.
 and a writ of error brought, and errors assigned. And upon the P. 32.
 first argument the judgment was affirmed *nisi*, &c. Mr. solicitor
 6 E general

Construction
of sentences.

Wreck be-
longing to the
office of high
admiral.

general (Sir John Hawles) argued, that the wreck would pass by the words *maris ejecta*, which clause was not restrained with, appertaining to the office, &c. there being other distinct matters granted, to which the restriction at the end must be applied. But *per Holt* chief justice, in regard that there is but one *concessit*, or word of grant, all the clauses shall be taken to depend upon one another, and the clause of restraint will extend to them. Otherwise if there had been any word of grant intermediate. And of that opinion was the whole court. But afterwards upon the rule for judgment *nisi*, &c. Mr. Whitaker came, and argued, that the restraining clause, of *eidem spectantia et pertinentia*, did not extend to wreck of the sea; because wreck could not belong to the said office by prescription, for the office itself begun within time of memory. *Spelm. verbo Admiralty*. And therefore it must be compared to the case in 9 Co. 27. b. where the King grants *bona et catalla felonum dicto manerio spectantia et pertinentia*; there because goods and chattels of felons lie in grant, and cannot be appendant to the manor, therefore it amounts to a new grant of them. So here, because wreck cannot be appendant to the office by prescription, it will amount to a new grant of all the wrecks of England then in the King's hands. 2. He insisted upon the same objection that the solicitor general had made before, and cited some cases, to prove, that the words of restraint should not be applied to them, but that the *necnon* would make them several sentences. 1 Leon. 119. 2 Roll. Abr. 51. And for the matter of nonrecital, he cited *Dier* 77. a. But *per Holt* chief justice, wreck may be claimed by prescription; and for all that appears, wreck may belong to the lord high admiral by prescription. For the office of lord high admiral is an antient office time whereof, &c. though perhaps it was not vested in a single person, or in the same manner as it is now. *Dier* 152. b. There is a prescription, for the lord high admiral to grant the office of register of the admiralty for life. And that is an answer to the first objection. As to the second, the case in 1 Leon. 119. is, because the general words follow the special, and without such construction the special words would be void. And *Holt* chief justice said, that he made no doubt, but wreck belonged to the admiral about the five ports, and such places where he was most conversant in ancient time. Judgment was affirmed absolutely. *Ex relatione m'ri Jacob*.

Rex vers. Foster.

Foster was indicted for that, that he had ingrossed *magnos et excessivos* numerous volucrum ferarum Anglice wild fowl mortuarum, with design to make them dearer, &c. Mr. Robert Eyre moved to quash it for the uncertainty, because they do not shew how much, &c. And he cited *Cro. Car. 380. magnam quantitatem straminis et foeni* held ill. [See 2 *Bulstr. 317. 1 Roll. Rep. 134.*] And the case of the King and Roberts since the revolution, where a ferryman was indicted for extortion in taking four pence a score for sheep carried over, where he should but have taken two pence a score, &c. The defendant upon not guilty pleaded was convicted, but judgment was arrested, because the indictment did not shew, for how many score he had taken four pence. And the indictment against Foster was quashed.

Uncertain indictment.
Cro. Car. 380.
2 Bulstr. 317.
Bro. Indictm.
P. 6.
2 Lev. 208.
12 Mod. 435.
Rex v. Roberts, Show.
389.
Holt 352.
Cro. El. 489.
1 Lev. 203.
2 Hawk. P. C.
abr. 213. f. 47.
2 Haw. P. C.
233. cap. 25.
f. 76.
Jones 156.

Foster vers. Hexam. Ante 427.

THE case of conusance demanded by the bishop of Ely was this term moved again. And then the conusance was allowed *nisi*, &c. And Holt chief justice demanded a sight of the record of the case in *Edward 3.* but they had only a copy of it. Upon which Holt said, that the record itself should have been in court, where the judgment is grounded upon the record, as it is here, the entry being *inspectis record'*, &c. And he said that the demand ought to be entred as of *Hilary* term, and so continued by *curia advisare vult*, &c. And he said, that they had no need to have pleaded so many allowances; but they might have pleaded but one only, and have relied upon it. 21 *Edw. 4. 44. accord.* For if a franchise lies in grant, and cannot be claimed by prescription, the allowance in the King's Bench, or Eyre, or confirmation by patent, will be sufficient.

Lacy vers. Williams. Ante 227.

Intr. Mic. 10 Will. 3. B. R. Rot. 586.

ERROR was brought upon the judgment given in this case in the Common Pleas, and the general errors were assigned. And the same point was argued here, as in the Common Pleas, viz. Whether a recovery, in which there was no tenant to the *praecipe* before the writ of *summoneas ad warrantizandum* issued, and

S. C. Salk.
568.
Carth. 472.
1 Show. 347.
1 Mod. 218.
Cro. Jac. 455.
Lutw. 1549.

Co. Li. 102.
Hob. 21.
F.N.B. 199.

and then a tenant was made to the *praecipe* pending the writ of summons, and before the return of it, and the recovery afterwards passed; whether this common recovery be good? And it was argued by Mr. Pratt in the writ of error for the plaintiff in error, that the recovery was not good. For (by him) though a common recovery is a common assurance, yet it has forms peculiar to it, which ought to be observed; as if there is no tenant to the *praecipe* pending the suit, and a recovery is suffered, it will be void; but according to 1 Roll. Abr. 868. it will be good against the parties by estoppel, but not against the issues in tail, which is the present case. In supposition of law the tenant ought to have the lands at the time of the suing of the writ, otherwise he cannot render them as the writ supposes. But if he purchases the lands pending the writ, that will make the writ good; *contra* if they come to him by descent, pending the writ. 41 Ed. 3. 5. 1 Hen. 6. 1. 18 Edw. 4. 26. But if there is no tenant at the return of the writ, the writ is abated; but the court cannot abate an abateable writ without plea. 9 Edw. 4. 12. *per Littleton*. There is no difference between a writ abated and abateable as to a stranger, for though the tenant does not take advantage by it by plea, yet that will not prejudice a stranger. In 7 Hen. 6. 19, 20. entry of the disseisee upon the tenant pending the writ abated it. And a recovery in formedon against the tenant pending the writ abated it. 3 Hen. 6. 34. But alienation by tenant, or recovery against him, by covin, will not abate it; for in such case he continues tenant as to the demandant until judgment that he ought, &c. but in the former case he does not continue tenant until judgment, and therefore the writ is abated. See *Bro. brieve* 108, 182. Judgment against him by estoppel shall be good against him.

2. The count supposes the tenant to be tenant of the lands, otherwise to what purpose do they make a demand against him.

3. The voucher supposes, that the tenant has seisin of the lands, for it would be absurd to vouch another, to warrant lands to him, which he hath not. And the definition of a warranty supposes seisin in the lands warranted. Co. Li. 365. 9 Edw. 3. 12. The vouchee may counterplead the voucher by nontenure, or entry pending the writ; and if the vouchee does not plead this, but vouches over, the second vouchee may plead this counterplea. 21 Hen. 6. 24, 49. Voucher is in nature or an action, Co. Li. 102. and every one ought to have cause of action at the beginning of it. *Bro. Brieve* 25, 77. Voucher comes in the room of *warrantia chartae*, and differs only in this, that voucher must be after an action, but *warrantia chartae* may be before an action brought against him; but *warrantia chartae* cannot be brought, but by him who is tenant of the land, Hob. 21. and for the same reason a man who is not tenant of the land cannot vouch. Then here the

the tenant cannot vouch the vouchee, and though the vouchee has not counterpleaded it, so that it will be good against him by estoppel, yet the issue in tail will not be bound by estoppel of the ancestor, for he claims *per formam doni*. 3 Co. 3. b. 12 Edw. 4. 14. b.

Objection. If the tenant purchases the land, pending the writ, that will make the writ good, &c. **Answer.** That rule is laid down upon cases upon pleas in abatement, and therefore must be understood, where the purchase is before the time for pleading in abatement is expired.

Objection. Where nontenure is pleaded to avoid a recovery, he pleads that he was not tenant at the purchasing of the writ *nec unquam postea*, which goes to the time of the judgment. **Answer.** 1. That is not a substantial part of the plea. 2. The *nec unquam postea* must be understood, from the purchase of the writ until the time of the pleading; for it does not appear in any of the cases, that the demandant replies, that the purchase was after the time of the pleading.

Mr. Keene for the defendant in error argued *e contra*. That there is no reason for avoiding a common recovery, except that the recompense will not enure to the issue in tail. 3 Co. 5. *Owen v. Morgan*. Hob. 259. And here the recompense in value will enure well to the issue. It has been generally taken, that there must be a tenant at the time of the return of the writ; but those books must be understood, of a recovery, where the tenant and vouchee appear at the same day, and judgment is then given. Hob. 262. 12 Ed. 4. 14. because it is a recovery from the said day. A writ is said to be depending until judgment. 3 Cro. 677. And therefore if the vouchee counterpleads the voucher, that the tenant had nothing, &c. at the time of the voucher, he ought to say, *nec unquam postea*. 45 Edw. 3. 2. *Rast. Entr.* 467. *Noy Rast.* 273. 126. In this case it had been good in an adversary action, because it had been his own act. 41 Edw. 3. 5. 8 Edw. 3. 32. 10 Edw. 3. 21. And he cited also the case of *Sambourn v. Belt*, where in a writ of error brought to reverse a common recovery, the errors were held to be ill assigned, because it was said only, that there was not any tenant to the *praecipe* at the return of the writ, where it should have been, nor at any time afterwards before judgment.

Holt chief justice. If the vouchee comes in, and counterpleads the voucher by nontenure of the tenant; he ought to say, *die impetrationis*, &c. *nec unquam postea*. The same law if the tenant

pleads nontenure in abatement. But if the tenant comes in by act of law, as by descent, pending the writ, that ought to be pleaded specially. The general rule is, that if the tenant gain the freehold after the writ purchased, and at any time before judgment, it makes the writ good. And there is good reason for it, for why should the Recovery be ill, but because it is against a man who had nothing at the time of the recovery, which fails in that case. In *scire facias* against terretenants after a Recovery they ought to plead, that the tenant had nothing in the land then, &c. nor at any time after; and without adding *nec unquam postea* it would be an ill plea. And as the writ is made good by a subsequent purchase, so the vouchee is made good by the subsequent entry into warranty by the vouchee. And therefore there is here a good tenant, and a good vouchee, and a good recovery. And as to the matter of the cause of action, the demandant might have good cause of action, tho' the tenant has not the lands; for the demandant's right is the cause of action, and not the other's being tenant to the *praecipe*. And therefore if the tenant hath the lands to render before judgment, it will be good. To which the other judges agreed. Judgment was affirmed *nisi*. And the last day Mr. Squib came, and argued to the same purpose as Mr. Pratt before, and cited 18 Edw. 4. 13. 18 Edw. 4. 26. per Littleton. 2 Roll. Abr. tit. Voucher 764. But the court continuing of their former opinion, judgment was affirmed absolutely. And Holt chief justice said, that the reason of the recompense in value in the case of common recoveries is *ratio una sed non unica*; for where a recovery is against tenant in tail, it will bar the reversion expectant upon it, and yet the recompense in value cannot go to that which was a great strain, and shews the favour allowed to common recoveries.

Farow *vers.* Chevalier.

S. C. 1 Salk. 139. Breach certain. 1 Lev. 94. Cro. Jac. 486. Cro. Car. 176. 1 Brownl. 29. 2 Mod. 176. 2 Jones 125. **C**ovenant was brought by a master against his servant upon a covenant, not to buy or sell without his master's leave; and the breach was assigned, that he had *diversis diebus et vicibus* between such a day and such a day sold to A. B. and C. and divers other persons unknown to the plaintiff, goods to the value of 800*l*. and another breach was laid, for having bought goods in the same manner. Upon issue joined, verdict for the plaintiff. And it was moved in arrest of judgment, that the persons were uncertain to whom the sale was made; and the time, in which the sale was made, was uncertain also; which ought to have been specially shewn. To which Mr. Hall for the plaintiff answered, that the persons have no need to be shewn, for avoiding prolixity in pleading.

ing. 3 Cro. 916. *Braban v. Bacon*, 2 Cro. 565. Cro. Car. 610. 2 Cro. 567. laid generally. And as to the time, *diversis diebus et vicibus* was well enough. Raym. 8, 9, 10. Stile 420, 428. Holt chief justice. In an action of covenant the breach may be assigned generally. But in debt upon a bond conditioned to perform covenants, the replication ought to be more certain. Where an act is described to be done between such a day and such a day *diversis diebus et vicibus*, in another action brought for the same thing one may aver, that the former action was for the same thing, &c. To which Gould justice agreed. But (by him) where an action is brought upon a penal law, one ought to shew the particular facts, and *diversis diebus et vicibus* will not be good, because there a man is intituled to distinct penalties. *Contra* in covenant. Judgment for the plaintiff. *Ex relatione m'ri Jacob*.

Parkhurst *vers.* Foster.

Intr. Trin. 9 Will. 3. B. R. Rot. 363.

S. C. 1 Salk.
387.
5 Mod. 427.
Carth. 417.
S. C. 12 Mod.
254, 255.
Show. 50.
Keyling 24.
81.
1 Hawk. P.
C. 91. cap.
33. sect. 10.
4 & 5 Will. &
Mar. cap. 13.
par. 18.

THE plaintiff brought an action of trespass against the defendant, for billeting a dragoon upon him, and forcing him to find his meat, drink, hay and straw for his horse, &c. Upon not guilty pleaded, special verdict, that the plaintiff kept a house at *Epsom, et dimisit conclavia, Anglice* lodgings, *talibus quales* came there *propter salubritatem aeris*, or to drink the waters, or for their pleasure; and that during the time of their abode there the plaintiff dressed meat for them at four pence the joint, or sold them meat ready dressed, if they pleased, and also small beer at two pence the mug, and also found for them stable room, hay, and oats, for their horses, paying eight pence a night for hay, and four pence a gallon for oats; and that he had no licence to sell ale from the justices; and that he did not sell any of the said provisions to any other person: then they find the defendant constable, and bring him within the act for billeting soldiers, &c. and that he billeted the soldier upon the plaintiff, and that the soldier compelled the plaintiff to find him meat, &c. And the question was, whether the plaintiff was such a person, as the act of 4 & 5 Will. & Mar. cap. 13. par. 18. intends to make liable to have soldiers billeted upon him; and the whole court was of opinion that he was not. For this act is a great invasion of the liberties of the subject; and therefore if the words of the act will be satisfied, without including such a person as the plaintiff is described to be, it shall not be extended to him. And he is not within any of the words of the statute; for lodgers cannot come by authority of law upon their journey without a previous contract, and the plaintiff may

Variance between the verdict and the declaration.

Consequential damages.

may refuse any of them, if he pleases; and therefore he is more limited than him whom the act describes. 2. They have not any beer to sell, but only what serves their family; and therefore it cannot be an alehouse. Besides, that he is not obliged to sell at certain rates; and therefore he is not comprehended within any of the persons described in the act. But then Mr. serjeant *Wright* and Mr. *Cowper* for the defendant had taken exception, that there is a variance between the verdict and the declaration; and according to 2 *Roll. Abr.* 717. if there is more in the declaration than in the verdict, the variance will be fatal, if that which exceeds is material. The plaintiff here declares, that the defendant billeted a dragoon upon him, and compelled him, to find for the dragoon meat, &c. The verdict finds, that the defendant billeted the dragoon there, but that the dragoon compelled the plaintiff, to find him meat, &c. Now this action being conceived at common law (for it cannot be upon the statute, because it does not conclude *contra formam statuti*) the defendant will not be answerable for consequential damage, but every one must answer for his own damage; otherwise perhaps if it had been brought upon the statute. *Holt* chief justice. But at common law if a man does an unlawful act, he shall be answerable for the consequences of it, especially where, as in this case, the act is done with intent that consequential damage shall be done. This case was argued *Hil.* 10 *Will.* 3. by Sir *Bartholomew Shower* for the plaintiff, and by Mr. *Cowper* for the defendant; and *Pasch.* 11. by Mr. *Broderick* for the plaintiff, and serjeant *Wright* for the defendant. And this *Trinity* term judgment for the plaintiff by the whole court.

A die datus.

Ante 84.

No fractions of a day.

AN action was brought upon a policy of insurance for insuring the life of Sir *Robert Howard* for one year from the day of the date. The policy was dated 3 *Sept.* 1697, and Sir *Robert* died the third of *September* 1698 at one of the clock in the morning. And *per Holt* chief justice, *a die datus* excludes the day of the date; but *a datu*, or *a confectiione*, is from the act done, and so commences the same day, that it is dated or delivered. See 5 *Co.* 1. *Co. Li.* 16. *b.* Also another distinction was taken in this policy, where though he died upon the last day, and the law makes no fractions of a day, yet he being bound to insure the life of Sir *Robert* for a whole year, and the year was not complete until the said day was expired, it will be a breach. Yet *Holt* chief justice cited a case, where *A.* was born the third of *September*, and the second of *September* 21 years after he made his will; and it was held a good will, because the court would not make a fraction of a day; and consequently being of the age of twenty-one years, he might devise his lands. Sir *Bartholomew Shower* would have given evidence,

evidence, that by the custom, and in the understanding, of insurers, policies begin the day that they bear date, though they are mentioned to begin from the day of the date; but it was over-ruled. This was at Guildhall upon a trial before Holt chief justice this term. *Ex relatione m^ri Jacob.*

Rex vers. Corporation of Malden in Essex.

A *Mandamus* was directed to the bailiffs, &c. of the borough of Malden, reciting that by their constitution they ought to elect yearly two bailiffs out of such aldermen, &c. who had not been bailiffs within three years before; commanding them, to proceed to an election, &c. They return the letters patent to be, that they should elect bailiffs out of the aldermen generally without any restriction, and that they had elected two of them *secundum formam et effectum literarum patentium*. And the return was disallowed, because they should either have denied the constitution mentioned in the writ, or have shewn that they had elected according to it; but this return being general, that they had made the election out of the aldermen, was not any answer to the writ; for that might be true, and yet some of the aldermen might be elected, who had been bailiffs within three years before, and so not within the qualifications of the constitution shewn in the writ. And the *secundum formam tenorem et effectum literarum patentium* will not aid it, because the constitution shewn in the return varying from that shewn in the writ, will be understood of the letters patent shewn in the return, and not of those in the writ. But if they had been agreeable, it had been good. And a peremptory *mandamus* was granted.

S. C. 2 Salk.
431, 432. p.
11.
Return to a
mandamus to
elect, &c.
4 Mod. 34,
122, 136, 223,
Cro. Car. 133.

The inhabitants of Kings Langley *vers.* the inhabitants of the parish of St. Peters in St. Albans.

MR. serjeant Wright took exceptions to an order made at the general quarter-sessions of the justices of peace, upon an appeal to them made from an order made by two justices, for removal of a poor person to the last place of his settlement. And the exception was, that the appeal was lodged at the next quarter-sessions, and it appears upon the face of the order, that it was not then determined, but it was adjourned over for farther consideration. And it was held by the whole court, that they might well adjourn an appeal upon debate for farther consideration.

S. C. 2 Salk.
494, 605, 606,
608.
5 Mod. 329.
Justices may
adjourn an ap-
peal.

Rex *vers.* Harris. Ante 440.

S. C. Carth.
496.
Salk. 260.
5 Mod. 443.
F. N. B. 54.
D. E.
2 Inst. 54.
3 Inst. 161.
Moor 462.
pl. 649.
3 Bulstr. 92.
S. C. Comyns
61.

New execu-
tion or resti-
tution.

Knightley's
case.

INquisition of a forcible entry into the rectory of, &c. was taken the eighteenth of *October 7 Will. 3.* 1695. and restitution thereupon was granted; which restitution a little time after was set aside upon a *vi laica removenda*; and the fifteenth of *December 10 Will. 3.* 1698. a new restitution was granted; upon which the inquisition was removed into the King's Bench by *certiorari*. And Sir *Bartholomew Shower*, Mr. *Eyre*, &c. moved several times, as well the last term as this present *Trinity* term, to have a re-restitution. And the first thing that they urged was, that this second restitution was irregularly obtained. 1. Because the justices had executed their power, by putting the party in possession immediately after the inquisition taken, and therefore they could not grant another restitution after it. But *per Holt* chief justice, if possession be delivered by *habere facias possessionem*, or grant of restitution, and that is avoided immediately by a new force; there the party shall have a new *habere facias possessionem*, or a new writ of restitution. But if after the restitution awarded the party enjoys quiet possession, and then he is removed by a new force, there he must resort to a new remedy. It hath turned sometimes upon the return of the former writ of restitution before the new force, and where such writ is not returned. But it is the former distinction, which will determine the case one way or the other. 2. It was argued by Sir *Bartholomew Shower* and Mr. *Eyre*, that the grant of this second restitution was not good, because it was not granted in convenient time. For the intent of the statute of *Henry VI.* was to give speedy remedy; at least after such delay as was here, there ought to be some process, to renew the inquisition, upon which the party should come in, and shew what he could say, why restitution should not be granted; for his possession might become lawful by subsequent conveyance or otherwise. And it is agreeable to the reason of the common law; for in personal actions after the year and day a man could not have execution of any judgment, but was driven to his action of debt upon the judgment; and in real actions he must have had a *scire facias*, as now in personal actions by the statute of *Westm. 2. cap. 45.* Mr. *Eyre* urged also, that in criminal causes where execution is deferred, it cannot be awarded, without bringing the prisoner to the bar. 2 *Cro.* 495. *Hut.* 21. Sir *Walter Raleigh's* case. And also, that if the King had pardoned the offense, no restitution should go. 2 *Cro.* 148. *Yelvert.* 99. To which *Holt* chief justice agreed, and he cited *Knightley's* case, who was indicted for high treason in conspiring the assassination of the King, and being arraigned at bar in the King's Bench confessed the

the indictment, and judgment of death was pronounced against him in *Easter* term, and execution was countermanded, so that *Trinity* term passed, and then in the long vacation they had a design to execute it; and upon that all the judges of *England* met, to consider what could be done; and it was resolved by all, that in regard a term had intervened without execution done, it could not be awarded without bringing *Knightley* to the bar. And *per Holt* chief justice it would be the same thing, if *Trinity* term had not been past, but only begun; so that *Knightley* was imprisoned until *Michaelmas* term, and in the mean time he obtained a pardon. And the whole court after consideration had, were of opinion, that re-restitution ought to be granted, for this irregularity in delay of the award of restitution for so long time; for it ought to be done immediately, or otherwise great inconveniences would follow. And *Holt* chief justice founded his opinion upon 8 *Co.* 119. *b.* *Dr. Bonham's* case, and the cases there put. Where auditors have power to commit servants failing in their accounts by *Westm. 2. cap. 12.* it ought to be done immediately. 27 *Hen. 6. 8.* So by 15 *Ric. 2. cap. 2.* commitment by a justice of peace for a forcible entry ought to be forthwith. And there is no difference in reason, why restitution upon the 8 *Hen. 6.* should not be immediately, as well as the commitment upon the 15 *Ric. 2.* There is rather greater reason, because the conviction upon the 15 *Ric. 2.* is not traversable, as the inquisition upon 8 *Hen. 6.* is. And it would be a great mischief, and against the reason of the common law, if it should be otherwise; because the title in so long time might be altered. And though possession intimates, that the person possessed is the rightful owner, and so some reason for restitution; yet where a long space of time intervenes, the said reason is not of force. And *Holt* chief justice commanded the judgment to be entered specially. Because it appears upon *affidavits* made to this court, that restitution was not awarded until three years after the inquisition; re-restitution is awarded for that irregularity. But *Mr. Northey* prayed the court, that since re-restitution was matter of favour of the court, and not of right, the court would not grant it, unless they would consent to try the right; and that it was refused to be granted in the vicar of *Hadley's* case in this court, until the right was settled by a trial. But *per Holt* chief justice, he has known re-restitution granted in this manner, *viz.* that they should bring the writ of re-restitution with them to the assizes, and if the verdict upon the trial should be for them, that they should execute it immediately. And (by him) where the first restitution was just, and the inquisition is quashed, there the granting of re-restitution is discretionary; but where the first restitution was tortious, there re-restitution ought to be granted of right. And (by him) justices of peace may remove the force upon the view, but they

When execution awarded upon attainder.

Restitution ought to be granted immediately.

Re-restitution.

Restitution by whom grant- ed. they cannot grant restitution. Re-restitution was granted by the whole court.

Rex *vers.* Sudbury, Heapes, et al.

S. C. Cases
B. R. 262.

A riot must be
committed by
three or more.

3 Inst. 176.

3 Mod. 72.

1 Vent. 251.

THE defendants were indicted for that, that they *riotose routose se et illicite* assembled themselves, *et sic assemblati existentes riotose routose, &c. commiserunt* a battery upon *Mary Russel*. Two of them were found guilty, and the others were acquitted. And it was moved in arrest of judgment, that these persons being indicted for a riot, and only two found guilty; it is the same thing as if they had all been acquitted; because two cannot be guilty of a riot, and so the verdict was repugnant. Mr. *Mundy* for the King argued, that the principal charge was the assault and battery; and the *riotose, &c.* was only to express the manner, and a kind of aggravation of the offense. And they should be intended to be guilty of the battery, which was well laid, and no notice should be taken of the rest. And he compared it to the case 1 *Saund.* 228. where in an action laid *per conspiracyem, &c.* one only is found guilty, and judgment for the plaintiff, because the conspiracy is only circumstance, *&c.* *Jones* 93. 2 *Inst.* 562. But *per Holt* chief justice it is a specifical offense, and is laid as a riot, for the *riotose* extends to all the facts, and the battery is but part of the riot. In the cases cited the difference is between an action upon the case, and a formed action of conspiracy; in the latter one only cannot be guilty, *contra* in the other. But here the defendants being acquitted of the riot are acquitted of the whole of which they are indicted, and no judgment can be given for the King. But if the indictment had been, that the defendant with divers other disturbers of the peace, *&c.* had committed this riot and battery, and the verdict had been as in this case, the King might have had judgment. But in the principal case it was arrested.

Chace *vers.* Sir Ralph Box.

S. C. Abr.
Cases Eq. 154.
Custom of
London of chil-
dren advanced
in the life of
their fathers.

see 1 Vent. 176. b.

UPON a reference to the recorder of *London* by the lord chancellor, to certify what is the custom in *London* concerning the advancement of children by their fathers, *&c.* which would exclude them from having shares of the personal estates of their fathers after their death; serjeant *Lovell* recorder of *London* certified, the custom to be thus, *viz.* If the father gives to the child 1500 *l.* and in his will declares, that he has advanced him, and afterwards dies; the child shall have no part of the residue of the personal estate of his father. But if he had said by his will, that he had given

given 1500*l.* [which was a sufficient advancement] yet upon putting it in *batchpot* after the death of his father, he shall have his share of the personal estate of his father, &c. And if a man marries his daughter, and gives her a portion, if he does not take any notice of it in his will, this will be a sufficient advancement, and she shall have no share of her father's personal estate after his death. *Ex relatione m'ri Selby.* Note; Mr. Chesbyre was also present in Chancery, when Mr. Recorder made this certificate; but he did not intirely agree with Mr. Selby about the certificate *ut supra.* *The certificate is at length in 89. i. a. 1. Abr. 155.*

Mason *vers.* White, Marks et al'.

Intr. Pasch. 11 Will. 3. B. R. Rot. 211.

THE plaintiff brought an action upon his case against the defendant *White* as attorney, and the other defendants, for entering judgment against him without his assent, or without his having been arrested, or any process sued against him, and without having made any warrant of attorney to *White*; upon which a *fieri facias* issued, and his goods were taken, &c. Judgment by default; and a writ of inquiry being executed and returned, now serjeant *Wright* moved in arrest of judgment. 1. That the declaration is against *White*, one of the attornies *de curia domini regis de banco hic*; where it ought to be, at *Westminster*; for one cannot understand what place *hic* means, and therefore one cannot know what court the plaintiff means. *Sed non allocatur.* For *per curiam, de curia domini regis de banco* is the Common Pleas; and the judges will take notice that the Common Pleas is at *Westminster*, and therefore *hic* is at *Westminster*. 2. A second exception was, that the plaintiff has not said who were justices of the court; whereas he ought to have mentioned the chief justice by name, *et sociis suis*, &c. *Sed non allocatur.* For though in pleading of a fine they plead that the fine was levied before the chief justice by name, *et sociis suis*, yet there is no necessity here to name the justices of the court. 3. A third exception was, that it is said in the declaration that the defendants, the twenty-first of *December 5 Will. & Mar.* procured judgment to be entered, &c. Now the twenty-first of *December* always happens out of term, and the court will take notice of that; but every judgment must be entred of some day in the term; and also that they prosecuted a *fieri facias* the twenty-third of *December*, &c. which is out of term. But to this it was answered by Mr. *Northey*, that the declaration says, that they procured the judgment then to be entered as of *Michaelmas* term before, which is good. And of that opinion was the whole court. And as to the writ he said, that it was *emanari causaverunt* such a day, &c.

Case for entering judgment without assent.

Stile of the Common Pleas.

Notice that the Common Pleas is at Westminster.

Justices named.

Judgment entered out of term, as of the term precedent.

But *Wright* said, that that would be taken to be the *teste*; and he is concluded by the *teste*, and cannot aver against it. To which *Holt* chief justice said, that a man cannot aver that a writ was of another *teste* than it bears; but one may aver, *quod non emanavit* at the time alledged. This action is for a great wrong, and therefore no favour for the defendants. Judgment for the plaintiff.

Averment a-
gainst the *teste*.
1 Ventr. 362.
T. Jones 149.
Ante 212, 409,
411.

Rex *vers.* Orme and Nutt.

Certiorari to
remove an
indictment
from the Old
Bailey.

THE defendants were indicted, by indictment found at the Old Bailey, for making, printing, and publishing a false and scandalous libel against divers good subjects of the King to the jurors unknown, to the intent and purpose to defame the said subjects of the King to other subjects of the King to the jurors *cognitis et cognoscendis*, and to move strife among the liege subjects of the King to the jurors unknown, *cognitos, et cognoscendos*, &c. And this indictment after several motions was removed into the King's Bench by *certiorari*, which *certiorari* the court was very unwilling to grant; but upon information that the recorder, before whom the defendants were to be tried, looked upon himself as affected by the libel, a *certiorari* was granted. And it being tried before *Holt* chief justice, at *nisi prius* at Guildhall, the defendants were found guilty. And now Sir Bartholomew Shower, Mr. Mountague, and Mr. Hutton, moved in arrest of judgment that this libel did not appear to be prejudicial to any one, for the jurors did not know the persons who were affected by the libel; therefore they could not properly say that the matter was false and scandalous, when they did not know the persons of whom it was spoken; nor could they say that any one was defamed by it. Wherefore, &c. Judgment was staid until, &c. Note; this libel was intituled, *The list of adventurers in the ladies invention, being a lottery*, &c.

Libel against
persons to the
jury un-
known.

Iveson *vers.* Moore.

Intr. Hill. 9 Will. 3. B. R. Rot. 437.

S. C. 1 Salk. Eborum ff.
15.
Carth 451.
S. C. Comyns
58.

Memorandum quod alias, scilicet termino sancti Michaelis ultimo praeterito, coram domino rege apud Westmonasterium venit Henricus Iveson per Willelmum Calvert attornatum suum, et protulit hic in curia dicti domini regis tunc ibidem quandam billam suam versus Johannem Moore armigerum et Rutham uxorem ejus Samuelem Wright Jeremiam Colley Henricum Smith et Petrum Clakey in custodia marescalli, &c. de placito transgressionis super casum; Et sunt plegii de proseguendo, scilicet Johannes Doe et Richardus

Richardus Roe; Quae quidem billa sequitur in haec verba, scilicet, Eborum ff. Henricus Iveson queritur de Johanne Moore armigero et Rutha uxore ejus Samuele Wright Jeremia Colley Henrico Smith et Petro Clakey in custodia marescalli marescalciae domini regis coram ipso rege existentibus, pro eo videlicet, quod cum praedictus Henricus Iveson decimo quarto die Maii anno regni domini Willelmi tertii nunc regis Angliae, &c. nono et diu antea et semper postea hucusque possessionatus fuit et adhuc possessionatus existit pro quodam termino annorum adtunc et adhuc venturo et inexpirato de et in quadam carbonaria, Anglice a colliery, et minera carbonum, existente subter solum et terram et in visceribus cujusdam clausi sive parcellae terrae situatae et jacentis in parochia de Whitkirke in comitatu praedicto vocate Whitkirke field, et prope adjacentis cuidam altae viae regiae in parochia praedicta ducente ex boreali parte ex villa de Wetherby in comitatu praedicto in per et trans quandam moram ibidem vocatam Winmore et abinde in per et trans quandam venellam ibidem vocatam Aulshaw lane et abinde in per et trans villam de Whitkirke praedictam et sic retrorsum, necnon de et in quadam alia carbonaria et minera carbonum existente subter solum et terram et in visceribus cujusdam clausi morae sive parcellae terrae in parochia praedicta vocatae Halton moore situatae et jacentis et prope adjacentis communi altae viae regiae producenti ex boreali parte a villa de Whitkirke praedicta in per et trans praedictam moram vocatam Winmore et abinde in per et trans venellam praedictam vocatam Aulshaw lane et abinde in per et trans villam de Halton praedictam in comitatu praedicto et sic retrorsum, in per et trans quam quidem venellam vocatam Aulshaw lane carbonem e mineris praedictis acquisiti et effossi a clausis praedictis ad loca vicina circumjacentia carriari et portari soliti fuerunt et intendebantur; Cumque etiam eodem decimo quarto die Maii praedictus Henricus Iveson magnam quantitatem, viz. ducentas carraetatas, carbonum e mineris praedictis effossorum in clauis praedictis separalibus venditioni exponi paratorum habuit; Praedicti Johannes Rutha Samuel Jeremias Henricus Smith et Petrus praemissorum non ignari, sed machinantes et fraudulenter et malitiose intendentes eundem Henricum Iveson de usu et beneficio carbonariarum suarum impedire decipere et deprivare, et emptores carbonum extra carbonarias praedictas effossorum e carbonariis praedictis alienare et seducere, ipsosque ad carbonariam praedicti Johannis Moore prope adjacentem in parochia praedicta appropriare et procurare, postea scilicet praedicto decimo quarto die Maii anno regni dicti domini regis nunc nono supradicto, quatuor carectatas magnorum lapidum et unam radicem magnae fraxini in via praedicta in venella praedicta apud parochiam praedictam posuerunt et locaverunt, et lapides et radicem fraxini praedictos ibidem remanere per spatium unius mensis permiserunt et continuaverunt, per quos quidem lapides et radicem fraxini via praedicta in per et trans venellam praedictam in tantum obstupata

obstupata et obstrueta fuit, quod carucae et carriagia pro carriage et asportatione carbonum e carbonariis et mineris praedictis acquistorum et effessorum in per et trans viam praedictam per venellam praedictam transire non potuerunt; Per quod idem Henricus Iveson beneficium commodum et advantagium carbonariorum suarum praedictarum per totum tempus praedictum totaliter perdidit et amisit, et carbones e carbonariis praedictis acquisiti pro defectu emptorum ex causa praedicta sic impeditorum et obstructorum magnopere deteriorati et depretiati devenerunt; Ad damnum ipsius Henrici quingentarum librarum; Et inde producit sectam, &c.

Case for stopping a highway, whereby the customers could not come to his colliery, and his coals were spoiled.
Salk. 15.

The plaintiff declares, that he the fourteenth of May 9 Will 3. *et diu antea et semper postea hucusque* was and yet is possessed for a certain term of years then and yet to come and unexpired of a certain colliery in a close in the parish of *Whitkirke* in *Yorkshire*, *et prope adjacent. communi altae viae regiae ducenti* from such a place to such a place, *et sic retrorsum*, and that he used to carry his coals dug out of the said colliery *in per et trans* one of the places, in, through and over which the said common highway led; and that he the said fourteenth of May had two hundred loads of coals dug out of the said colliery, *venditioni exponi parat.* and that the defendants intending to deprive, &c. the plaintiff of the use and benefit of his colliery, and the buyers of coals dug out of the said colliery to alienate and seduce, and to appropriate them, and procure them to come to the defendant *Moore's* colliery next adjoining, &c. the said fourteenth of May stopped such a place, in, through and over which the said highway led, which continued stopped, &c. for a month, so that the plaintiff's carts and carriages for carrying of the said coals, &c. could not pass, &c. *per quod* the plaintiff *per totum tempus praedictum totaliter perdidit* the benefit and profit of his colliery, and his coals dug out of his said colliery *magnopere depretiati et deteriorati devenerunt, pro defectu emptorum ex causa praedicta sic impeditorum, &c. ad damnum 500 l.* Upon not guilty pleaded, a verdict was given for the plaintiff. Upon which it was against the action several times moved in arrest of judgment by Mr. Northey, Mr. Buxton, Mr. Ward, and Mr. Hutton, for the defendants. And it was argued on the other side, that the action would well lie, by Sir Bartholomew Shower, Mr. Mulso, and Mr. Chesbyre, for the plaintiff. And now this term the court pronounced their opinions in solemn arguments.

And Gould justice was of opinion, that this declaration would have been good upon a demurrer, and that the action would have laid; but without doubt (by him) it is good after a verdict, which has found the damnification. The objection against this action is, that

that it is founded upon a matter which is a public nuisance, and that the plaintiff has received thereby no special damage, that is to say, no damage more peculiar to himself than any other of the King's subjects; and therefore the plaintiff cannot have an action for a publick nuisance, but the remedy must be by indictment, &c. at the King's suit; but if he had received any special damage, he might have had an action, though the nuisance was publick in its nature. But to this he answered, that though he agreed that an action would not lie for a publick nuisance without special damage, for avoiding multiplication of suits, and therefore in this case if the plaintiff had concluded only *per quod* his carts or carriages could not pass, it would not have lain, nor have been maintainable, yet he was of opinion, that some special damage appears to be done to the plaintiff by this stoppage of the way, which is not common to the rest of the King's subjects; and this appears in the *per quod*, the business of which is, to close the action, and shew the cause of it. *1 Roll. Abr. 89. pl. 8.* If it be first considered in the general part of it, viz. *per quod* the plaintiff *proficuum*, &c. of the colliery *totaliter perdidit*, &c. Secondly, if it be considered with the addition, that the coals *pro defectu emptorem ex causa praedicta sic impeditorum deteriorati devenerunt et depretiati*; though it is not shewn that there were any buyers in particular. 1. In actions upon the case, where no damages are recoverable, a precise certainty of the damages is not necessary to be shewn in the declaration, *1 Leon. 236.* and therefore this general method of shewing his damage will be well enough. As if an action be brought by the master for battery of his servant, who cannot maintain the action, unless he has received special damage by it, as loss of the service of his servant, yet if he declares that he has lost the service of his servant *per magnum tempus*, it is well enough. *Hob. 284.* In *9 Co. 93.* in *quod permittat* the plaintiff declared of the erection of a nuisance, *ad nocumentum liberi tenementi sui*, and did not shew how; but because that it would be only for damages, it should be left to the inquest, as is said in *3 Edw. 3.* there cited, that the assise would say it in certain. Now here the *per quod proficuum*, &c. *amissit* resembles the case in *1 Roll. Abr. pl. 8.* where in an action for digging of turves in a place where the plaintiff claimed common, *per quod* he could not have his common *in tam amplo et beneficiali modo*, &c. it was held a good declaration; and yet without the *per quod* the action will not lie, as is agreed in the said book. 2. But then secondly, there is here a farther special damage, viz. that the coals *pro defectu emptorum ex causa praedicta sic impeditorum deteriorati et depretiati devenerunt*. And as to the objection, that the plaintiff has not shewn who were the buyers, &c. he answered, 1. That coals are a thing vendible in their nature. 2. That there is a difference, where the damage is the result of a single instance, as in case for words, by the speaking whereof the plaintiff *maritagium*

tagium amisit, there the plaintiff ought to shew that there was a communication of marriage between him and *J. S. &c.* But where the damage is complicated, and is greater or less, according to the fewness or number of instances, there the law is otherwise. And if the law were not so, it would be very inconvenient; for in the present case it would be almost impossible for the plaintiff to shew all the names of his customers, &c. And besides, it would be a very great difficulty upon him, for if he fails in the proof of any of the persons named in his declaration, it would be against him; and he would be so restrained to those named in the declaration, that he could not prove any others but them. In Indictment of barrettry the indictment is general, because it consists of multiplicity of facts; but the court in justice will compel the prosecutor to assign some particular instances; and if he proves them, he shall be admitted to prove as many more of them as he pleases, to aggravate the fine. 2. This action is brought against a wrong doer; and in such cases a general method of declaring has been admitted in all the courts, though liable to greater objections than this present case admits; as to declare, that he was, and yet is, possessed of a mesuage, and used to have common, &c. *tanquam ad mesuagium praedictum spectantem et pertinentem*, and the defendant to deprive him of his common, &c. adjudged a good declaration, because against a wrong doer. See 9 Hen. 6. 43, 45. 27 Hen. 6. 1. 3. Since there is no need of a precise certainty in point of damages, there will be no difference, where the damage is done in a private way, and where in a publick way; because there is no difference between damages in the first instance, and damages in the second instance; and then the case of *St. John v. Moody*, 1 Ventr. 274. intr. Trin. 27 Car. 2. rot. 1501. is a case in point; where the plaintiff declared, that he was possessed of a wood, and that he had a way leading from such a place to his wood, and that the defendant intending to deprive him of the benefit and profit of his wood, obstructed the way, *per quod* he lost the profit of his wood in felling and disposing of it; and the judgment was, after verdict, for the plaintiff, and affirmed upon error. The present case is like the case of Mr. *Harris* the counsellor, who brought an action upon his case for false and scandalous words spoken of him, *per quod* he lost his clients, without naming them. And the case in 1 Roll. Abr. 63. pl. 31. is the case in point, *per quod* he lost his customers generally. And Cro. Car. 510. *Morley v. Pragnall*, where in an action brought by an inn-keeper the plaintiff declares, that the defendant intending to annoy him and his family, *et hospites suos*, erected a tallow furnace, &c. *per quod* he lost several guests, and his family became unhealthful, and he lost several sums of money which he might have gained, and the judgment was for the plaintiff; and the case is reported agreeably to the truth, for he said he had

Harris's case.

had searched the roll of it. See 11 Hen. 4. 44. b. He cited *Baker v. Moore* also a case lately adjudged in C. B. between *Baker* and *Moore* ^{Moore.} *intr. Hil. 8 Will. 3. C. B. Rot. 316.* where in case the plaintiff declares, that there was, and time whereof, &c. had been, *quædam communis via in Lambeth ducens* from the river *Thames* in *per et trans* a certain place called *Bark-lane usque ad* such a place, &c. that the defendant erected a wall cross the said way, which stopped the passage, and continued it from such a day until the impetration of the plaintiff's original writ, *ita quod legei domini regis* could not use the said way as before, &c. *per quod tenentes diversorum mesuagiorum* of the plaintiff situate in, &c. *a mesuagiis, &c. recesserunt, &c. per quod* the plaintiff lost the profits of his houses, &c. And J. O. then King's serjeant moved in arrest of judgment, that the action would not lie, 1. because this damage was not special enough; but the whole court was of another opinion, and over-ruled it: 2. because he should have named his tenants in particular; *sed tota curia contra.* [See 9 Hen. 7. pl. 4. 21 Hen. 6. 7, 30, 32. a. 13 Hen. 7. 26.] but upon another exception, *viz.* that the plaintiff did not shew himself possessed of any tenement, in which there was a tenant, judgment was arrested; for the plaintiff could not be damnified, if he had not any houses. So in this case if the plaintiff had not shewn, that he had a colliery, it had been ill. He cited also the case of *Hart v. Basset*, Sir T. Jones 156. as a strong case for him; and he said that there was here special damage, which was not common to all; and therefore he was of opinion, that this declaration would have been good upon a demurrer. But admitting the contrary, yet it would be good after a verdict; and the judgment in the case of *St. John* and *Moody* was given upon account of the verdict, though ^{Errors aided by verdict.} they inclined, that it would have been ill upon demurrer. And then he cited many cases, where a verdict aided imperfections. *Allen* 22. 1 *Leon.* 236. 1 *Ventr.* 13. and concluded, that the case is within the words of the statute of *Elizabeth*, that after the right tried, the entry of the judgment shall not be staid by any default of form. And therefore he was of opinion, that the plaintiff ought to have his judgment.

Turton justice was of opinion, that the plaintiff ought to have judgment, it being after verdict; and cited 1 *Keb.* 846. 2 *Saund.* 346. *Peters v. Opie*, 1 *Ventr.* 126. *T. Jones* 125. cases to prove the omnipotency of a verdict. But he made a doubt, if it would have been good upon a demurrer.

But *Rokeby* justice and *Holt* chief justice argued *e contra*, that the judgment ought to be arrested. And *Rokeby* justice said, that he would admit, that no particular person could have an action for the

the general stopping of a way. 1. Because the offender is punishable at the King's suit. 2. Because multiplicity of actions is to be avoided; and if one man may have an action, for the same reason a hundred thousand may: but if the stopping be a particular damage to a particular person, he may have an action: but then the particular and special damage must be particularly and certainly alleged, which is wanting in this action, and therefore it does not lie. It is agreed, that if the *per quod* had been omitted, the action would not have lain, because the complaint had then been only of a general and common nuisance and damage. But here the *per quod* is too uncertain; for it is only, that he lost the sale of his coals; and he does not shew, that he could have sold them, &c. Objection. Damages in the *per quod* ought not to be shewn certainly. Answer. That is to be understood, where the action is maintainable of itself without the *per quod*; but if the *per quod* is the ground of the action, there the damages ought to be shewn certainly and specially. But if the plaintiff had shewn here any person in particular, who intended to buy of him, and by reason of this stopping of the way refused, &c. the action would have well lain. But now it is like the case 3 *Bulstr.* 75. where in an action for slander of his title *per quod* he could not make a lease, &c. judgment was arrested, because the plaintiff did not shew a communication to have a lease, &c. Admitting the case of *Hart v. Basset* to be law, yet there is there some special damage. So in the case of *Maynell v. Saltmarsh*, where an action was brought for stopping a way, *quae fuit maxime propinqua via*, *per quod* he could not carry his corn, so that the rain rotted the corn, &c. And it is no objection to say, that perhaps the plaintiff did not know his customers; for that is a good reason why he should not have the action, for he ought not to recover damage for a thing, that he does not know, whether it is damage to him or not. And therefore he was of opinion, that judgment ought to be arrested.

A man who has a coal mine adjoining to a highway, cannot have an action for stopping it, more than any other.

Holt chief justice argued also for the defendant. And he made two questions. 1. Whether the plaintiff ought to have an action, because his coal mine was contiguous to the highway, and the way was a great convenience to him to carry his coals, and therefore the stopping was an obstruction of that convenience? 2. If there ought to be farther some special damage, to support the action; whether this damage is specially enough shewn? And as to the first point he was of opinion, that the plaintiff could not have an action for the stopping of this way, because his coal mine was near it; for though it is a convenience to him, yet the situation does not give him any greater right to the way, than any other of the King's subjects. But actions upon the case for nuisances are founded upon particular rights; but where there is not any particular right,

right, the plaintiff shall not have an action. And that is the reason of the case of *Fineux and Heynden*, 3 Cro. 664. Every one who brings an action, shall have it proportionable to his right. Therefore, 2 Saund. 115. *Coryton v. Litheby*, two shall join in an action of account of their joint right. Objection, That the plaintiff sustains here a particular damage. Answer, That he sustains no more particular damage, than any other of the King's subjects, who have all the same right to pass by this way. In indictment for stopping a highway, the indictment concludes, *ad nocumentum omnium, &c. per viam illam transeuntium, &c.* The stopping of any man is a particular damage to him, but the stopping of a way is a common damage to all. Objection. The *per quod proficuum amisit, &c.* shall be good, as in the case of stopping a watercourse, *per quod* he lost the profit of his mill. Answer. There the action will well lie without the *per quod*, because he who has the mill, has a particular right to the watercourse; and that was the reason of the case of *St. John v. Moody*, for there the way was private. But there is no such case in the law as this present case. The case of 27 Hen. 8. 27. is no authority for this action; for there *Baldwin* chief justice was of opinion against the action, and his opinion has been held law ever since. Co. Li. 56. But he agreed the case of the particular damage, because no indictment lies for it. 2. By him, the plaintiff does not appear by this declaration to have sustained any particular damage; for if a particular damage is necessary to maintain the action, such particular damage ought to be laid in a special manner, and it ought to be shewn in what it consists; now here though it is laid, that the plaintiff lost his customers, &c. that is not special enough, but it ought to be shewn, that customers were coming to buy, and were obstructed, whereby, &c. And 1 Roll. Abr. 63. though in point, yet has always been denied to be law; and it is adjudged in 1 Roll. Rep. 79. *contra*. And the difference is, where the words are actionable by themselves, there the damage need not be shewn specially. 1 Roll. Rep. 79. 1 Roll. Abr. 24, 35, 36. Cro. Car. 140. But where the words are not actionable by themselves, there the special damage will not maintain the action, unless it be specially shewn; and in such case, as the present, without shewing who were the customers, &c. 1 Roll. Abr. 58. pl. 1. 2 Bulstr. 276. Now there is no difference between an action like this brought for such a nuisance, and an action for words not actionable. In both cases it is the special damage which will make them maintainable, and therefore it ought to be specially shewn. He cited likewise a case, which was also cited by the counsel at the bar, between *Pain and Partridge* in this court, *intr. Pasch. 2 Will. & Mar. B. R. Rot. 43.* *Pain v. Partridge*, 3 Mod. 289. and adjudged *Pasch. 3 Will. & Mar.* where upon error out of the Common Pleas the case was thus; the plaintiff declared, that the

Custom in a town good.

A man bound by prescription to find a ferry boat cannot change it to a bridge.

Maynell v. Saltmarsh, 1 Keb. 847.

town of *Littleport* was an ancient town, &c. and that there was a river called *Milney* river, over which all the King's subjects ought to have passage; that the proprietors, &c. used, &c. to find a ferry boat for the passengers, and for that had used time whereof, &c. to have reasonable toll; but that there was a custom within the town, that all the inhabitants of the said town should pass in the said ferry boat toll free; that the plaintiff was an inhabitant of the said town, and that the defendant was proprietor, &c. and ought to find the ferry boat; but that he did not keep a ferry boat, *per quod*, &c. and two questions were made in that case. 1. whether the custom was good, being laid in a town; and adjudged that it was: 2. whether the action would lie; and adjudged, that it would not; for though the plaintiff had some particular damage, yet since that proceeded from a general nuisance, an indictment was a more proper remedy, and not an action; for the particular right was, in being exempt from the payment of toll, and not in the passage, for that was common to all; it was held also in the said case, that the proprietor of the ferry was obliged in such manner by the prescription, that he could not change the ferry boat to a bridge, so as to discharge himself of the maintaining of a ferry boat, by building a bridge. He cited also the case of *Maynell v. Saltmarsh*, *intr. Mich. 14. or Hil. 14 & 15 Car. 2. B. R. Rot. 271.* where the plaintiff declared, that there was a highway leading from *A.* to *B.* and that the plaintiff had a close in the town of *A.* sowed with a great quantity of corn, *viz.* &c. and shews what, &c. and that he lived in the town of *B.* and that this way was the most convenient, *et maxime propinqua via*, for carrying his corn from his close in *A.* to his house in *B.* and that he had so many loads of corn ready to be carried, &c. and that the defendant stopped the way, so that he could not carry his corn, &c. and in the mean time the rain fell, and spoiled his corn; after verdict for the plaintiff judgment was given for the plaintiff in the Common Pleas *sub silentio*; and upon error brought in the King's Bench, error was assigned, that the action would not lie; but it was adjudged, that it would. But the said case differs from the present case, because there was a special damage to the plaintiff. As to the case of *Hart v. Bassett*, *T. Jones 156.* he said, he had no need to deny it, because the plaintiff declared, that he was farmer of the tithes of *B.* and that the way was near to the plaintiff's land, and convenient for the carrying away of the tithes to his barn; that the defendant had stopped the way, by which the plaintiff was compelled to go round about, &c. And if it was as Mr. justice *Gould* cited it, that he was driven to a greater expense, that makes it better than it is in the report of *T. Jones 156.* Besides, there is another ingredient, that he was liable to an action, if he permitted the tithes to lie upon the ground beyond a convenient

nient time; and all this matter is shewn specially; but if there was no more than the bare going round about, it is a hard case. As to the objection, that perhaps the plaintiff did not know his customers, and therefore could not shew them, &c. he answered; that then there is no reason, that the plaintiff should have this action, for it is necessary, that they should come if they could; and therefore if he cannot prove some, who would have come, there is no ground for this action. If actions should be suffered to be brought for imaginary damages, where none can be proved; the maxim of the common law, that no action will lie for a common nuisance, would be destroyed. And therefore he was of opinion, that judgment ought to be arrested. He cited the case of *Vertue v. Bird*. See it reported, 3 *Keb.* 766. Note, in this case 3 *Mod.* 156. upon one of the former motions in arrest of judgment, a rule was made, that judgment should be arrested *nisi*, &c. And now the court being divided, the plaintiff could not have the rule discharged, nor have his judgment. But if upon the former motion the court had been divided, judgment would have been for the plaintiff. But now, because it cannot be entred without continuances, there must be a rule for judgment, which cannot be had, the court being divided. But if upon a motion for a prohibition a rule was made to hear counsel, and all to stay in the mean time, and upon the hearing of counsel the court was divided, they might proceed in the spiritual court. Agreed by *Holt* to have been done before. See *Moor* 180. And afterwards by consent of *Holt* this case was argued before all the justices of the Common Pleas and barons of the Exchequer at *Serjeants inn*; and they all were of opinion for the plaintiff, that the action well lay.

Trevivan *vers.* Tooker.

Ejectment. Upon special verdict the case was thus. *A.* was seised of a house, orchard, meadow, and divers other lands, in fee; and makes a feoffment in fee of them, to the use of himself for life, and after his death, as to one moiety of the house, orchard, and meadow, to the use of *B.* wife of *A.* for her life, and after her death, then to the use of *C.* son of *A.* for his life, and after their deaths, then as to one moiety of all and singular the premises, to the use of *D.* the wife of *C.* for her life, and as to the other moiety, to the use of the heirs males of *C.* and as to the other moiety after the death of *A.* *B.* *C.* and *D.* to the use of the heirs males of *C.* *A.* died. Then *C.* died. And the question was, whether *D.* should take during the life of *B.* the limitation being, after the deaths of *A.* *B.* and *C.* And it was held, that it should be taken respectively, for the share of every one after their respective

A limitation
of estates vests
respectively.

respective deaths. And *Holt* chief justice said, that this was no more than *Pollard's* case cited 5 Co. 8. b. Lease of one acre to *A.* for life, and of another to *B.* for life, and of a third to *C.* in tail, and after the determination of all the estates, then to *D.*; and held, that *D.* should take respectively after the several determinations. And so the cases of *Aylett v. Chopping*. *Yelv.* 183. 2 Cro. 259. and *Cook v. Gerrard*, 1 Saund. 180. and justice *Wyndham's* case 5 Co. 7. And though the cases in *Saunders* and *Cooke* are in case of a will, it is the same thing, for the judgment was not founded upon that. The plaintiff, which was *D.* had judgment by the whole court. *Ex relatione m'ri Jacob.*

Pullen *vers.* Palmer.

Declaration of
a return made
modo et forma
sequenti.

IN an action upon the case for a false return made to a *mandamus*, the return was set out to be made *modo et forma sequenti*, &c. And after verdict for the plaintiff serjeant *Wright* moved in arrest of judgment, that this was not certainly enough shewn to be the very return that the defendant had made; and therefore that the declaration was ill. *Sed non allocatur.* For, *per curiam*, it is well enough. And judgment for the plaintiff.

Harvey *vers.* Williams.

Intr. *Hill.* 10 *Will.* 3. B. R. Rot. 160.

Plea that the
plaintiff is
bankrupt.

IN *indebitatus assumpsit* the defendant pleaded, that the plaintiff was bankrupt, and therefore the defendant could not pay, for fear a commission should be sued, &c. Upon demurrer, judgment for the plaintiff.

S. C. 1 Salk.

142.

Carth. 480.

5 Mod. 438.

S. C. 12 Mod.

270.

Ibid. 686.

2 Wms. 209.

The by-law
of the city of
London to fine
men elected
refusing to
serve the office
of sheriff.

The city of London *vers.* Vanacker.

UPON a *habeas corpus* directed to the mayor, aldermen, and sheriffs, of the city of *London*, to remove the body of *Vanacker* with the cause; they return, that the city of *London* is an ancient city and a county of itself, and that the citizens of the said city have been time whereof, &c. a body politick known by divers names, &c. that King *John* by his letters patent bearing date, &c. granted to them the sheriffwick of the said city of *London* and county of *Middlesex*, and that they should make the sheriffs of themselves; they return the statute of *Magna charta* and divers other statutes confirming their liberties; they return also a custom

to make by-laws, and that if any of their laws or customs be defective, or difficult to be understood, or if any matter arise for which convenient remedy was requisite, that then the common council should ordain convenient remedy, so that they be honest, profitable, and reasonable; they return also, that there is, and time whereof, &c. hath been, a court of record held before the mayor, aldermen, &c. in the inner chamber of the *Guildhall*; they return also on act of common council made 7 Car. 1. reciting several acts of common council before made concerning sheriffs, and for that, that they were found inconvenient, because the penalty of refusers was too mild, and therefore the city might be prejudiced for want of persons to execute the said office of sheriffs, they were all repealed, and it was enacted, that the election should be yearly upon Midsummer day, and that if there were occasion for a new election, then upon such day as the court of aldermen should appoint, and that he who should be elected, being a freeman of *London*, should serve, and should not be discharged, unless he came voluntarily before the court of aldermen, and swore, that he was not worth 10000 *l.* and brought six compurgators with him, such as the lord mayor and court of aldermen should approve, who should swear, that they believe in their consciences, that he swears that which is true; and if any freeman elected sheriff, and proclaimed in the *Hustings*, should not come at the next court of aldermen to be held in the inner chamber of the *Guildhall*, and there declare, that he would accept the said office, and become bound in a bond of 1000 *l.* to appear in the at the vigil of *St. Michael* next ensuing, and accept it, not having reasonable excuse to be allowed by the lord mayor and court of aldermen, nor being discharged, &c. that then he should forfeit 400 *l.* one hundred pounds to be paid to the subsequent sheriff, the other three hundred pounds to the use of the mayor and commonalty of the city of *London*, the which 400 *l.* should be recoverable in the court of the mayor, &c. then they shew, that the defendant was elected sheriff, and proclaimed, &c. and that he did not come, &c. by which he forfeited the 400 *l.* for which a plaint was levied, &c. And after this case had been argued by Mr. *Northey* and Mr. *Broderick* for the defendant, and by Mr. Recorder *Lovell* and Sir *Bartholomew Shower* for the city; now *Holt* chief justice pronounced the opinion of the court, that the by-law was good, and that therefore a *procedendo* ought to be granted. And (by him) the principal objections which have been made against this by-law, are reducible to four, 1. That the subject matter, of which the by-law is made, is not within the custom of the city to make by-laws, because the sheriffwick was granted within time of memory, and therefore the custom cannot extend to it; and because the sheriffwick of *Middlesex* is without the city, and therefore

fore cannot be affected by the custom within the city. 2. That it is unreasonable, because it imposes an oath upon the person elected of his insufficiency, and that he shall bring also compurgators with him, &c. 3. That the mayor and aldermen are judges of the reasonableness of the excuse, and so judges in their own cause, since the words of the by-law are, such reasonable excuse as the mayor and aldermen shall judge proper, and not a reasonable excuse generally. 4. That no provision is made, that the party elected shall have notice, so that if he was beyond the sea he is bound to take notice, which is very unreasonable and inconvenient. The first objection is divisible into two parts. 1. That no by-law can be made, by virtue of the custom of the city, concerning the sheriffwick, because it is a franchise vested in the city by the charter of King *John* within time of memory. But to this he answered, that admitting that the custom could not warrant such a by-law, yet it might be made of common right; for of common right every corporation may make a by-law concerning any franchise granted to them, because it concerns the welfare of the body politick, and is (as Lord *Hobart* says) included in the very act of incorporation. *Hob. 211.* And that is to the body politick, as reason is to the body natural, to govern themselves. And then if a franchise be granted to a corporation, it is under a trust, that the corporation shall manage it well, which cannot be done but by a by-law. 2. The corporation having power to make by-laws for the well governing of the city, that ought to be the touch-stone, by which their by-laws ought to be tried. *5 Co. 62, 63, 64.* and if it be for their benefit, the by-law will be good. Now this by-law is for the good of the city, and of the King, *vez.* that responsible persons should be sheriffs, &c. And it is not necessary to be confined to matters concerning the franchise of the city only; but it is sufficient if it is for the good of the city; as *5 Co. 62.* Chamberlain of *London's* case, concerning the bringing of cloth to *Blackwell-hall*, and paying hallage; it was held, that it bound all, though it did not concern the franchise of the city. 3. The very constitution of the charter of King *John*, which grants this franchise to the city, obliges the citizens to make by-laws concerning it; for the charter appoints, that they shall make such as they please out of themselves sheriffs, &c. so that they ought not to execute it by themselves, nor by deputy, but ought to appoint two persons to execute the office; who as soon as they are appointed by them are absolute sheriffs, and immediately attendant upon the King's courts. And it would be in vain to give them such power to elect sheriffs, &c. if they could not compel the persons elected to serve. The acceptance of the charter obliges the body politick to perform the terms upon which it was granted; and as every citizen is capable of the benefit of the franchise, so he ought

A by-law may be made concerning any franchise granted to the corporation.

The acceptance of the charter binds the corporation.
3 Cro. 399.

ought to submit to the charge also. And as those who accepted the charter were bound by it, so are all those who are made freemen since. As if a common be granted to a corporation, the benefit accrues to the particular members. And therefore as they have advantage by some franchises, so they ought to submit to the charges of others. But he said, that he would take it for granted, that this franchise to elect their sheriffs is very beneficial to the city; and of that opinion was *Charles II.* when a *quo warranto* was sued, to seize that among other franchises into the King's hands. 4. Since it is part of the constitution by which this franchise is granted to them, that the office of sheriff shall be executed by citizens elected out of themselves; if they did not make election, it would be a forfeiture of their franchise. For all franchises which are granted, are upon condition that they shall be duly executed, according to the charter that settles the constitution. And that being a condition annexed to the grant, the citizens cannot make an alteration; but if they neglect to perform the terms of the patent, it may be repealed by *scire facias*. Therefore it is necessary, that they should have a coercive power, to compel persons, to take the office upon them, and that without any custom, or otherwise this office might be lost by the city. And therefore he was of opinion, that without a custom they might have made such a by-law as this. But however, admitting that it could not be good without a custom, yet he was of opinion, that the by-law was warranted by the custom. For though the subject matter has its original within time of memory, yet since it is for the good of the city, it is within the custom, for the custom is general. And there is no necessity, that the subject matter should be of time whereof, &c. For general customs may be extended to new things which are within the reason of the customs 5 Co. 82. *Snelling's case*, an authority in point. Objection. The defendant may be indicted for refusing to serve, &c. which is a more proper remedy. Answer. That will not prevent the forfeiture of the franchise that will incur, if the city does not appoint to execute the office, &c. And it is like the case in *Littleton's reports*, 94, 105, 128. 2. No indictment will lie in this case, because the refusal is not at the time when the defendant ought to enter upon his office, but before. If the defendant had refused at the vigil of *St. Michael* he might be indicted; but not for this refusal before, because notwithstanding such refusal he might enter upon the office at the day. As to the second part of the objection, that they cannot make a by-law concerning the sheriffwick of *Middlesex*, to compel the defendant, &c. to serve there, because it is out of their jurisdiction in another county, and therefore to be compared to the case of the conservancy of the river of *Thames*, where they cannot make laws out of the liberties of the city; *Holt* chief justice answered. 1. That though

Not to elect sheriffs a forfeiture of the franchise.

T. Jones 204. General customs may be extended to new things.

T. Jones 144.

though the execution of the office is to be done out of the city, yet the sheriffwick is within the city, as being a franchise belonging to them, and therefore within their jurisdiction. 2. That the persons elected are citizens, and therefore under their jurisdiction. 3. That all the acts requisite to be done, are to be done in *London*, as appearance, &c. As to the second objection, that it is unreasonable to impose an oath upon the party; and not only so, but to bring also six compurgators, citizens of *London*, who are to have part of the fine, who shall swear, &c. such as the lord mayor and court of aldermen shall judge fit, &c. He answered, that it is a favour to the defendant; for it must be granted, that he is bound, when elected, to serve, and that was resolved in *Larwood's case*; and he cannot disable himself by any allegation: but here the by-law admits an excuse, *viz.* that he is not worth 10000 *l.* and admits also the oath of the party himself, which is a greater favour; only it requires the oath of six compurgators, which is not unlawful, for a voluntary oath may be taken. 3 *Cro.* 469. 1 *Sid.* 281. And as to the compurgators, it is only an imitation of the common law, where a man shall discharge himself by wager of law; and though the books mention eleven, yet it is the course in the common pleas to have but six, as here. And it is reasonable, that the mayor, &c. shall have the refusal to admit of them, to the end that they be not infamous persons, &c. But it was objected, that there was no exception, if a man chosen should be *non compos*. Answer. Such persons are understood to be excepted in all laws; and therefore it would be ridiculous to make an express exception. As to the third objection, that this by-law is unreasonable, because by it the man elected is obliged to appear at the next court of mayor, &c. and unless he have such reasonable excuse as shall be allowed by them, he shall incur the penalty of the 400 *l.* &c. so that they are judges in effect in their own cause. He answered, if the mayor, &c. allow the excuse, the city will be bound for ever; and if they refuse to admit a reasonable excuse it is not final, because it may be controverted in an action brought for the penalty. And (by him) this act of common council ought to be expounded according to the statute 23 *Hen. 8. cap. 5.* concerning the commission of sewers; where though they are impowered to proceed according to their discretions, yet their discretion ought to be grounded upon reason and law. 5 *Co.* 100. *Rooke's case*. As to the fourth objection, that this by-law makes no provision that the party shall have notice, and perhaps he may be beyond the sea, &c. He answered, that in judgment of law every citizen is intended to be inhabiting within the city, and ought to be present at all publick courts and assemblies, and therefore he is privy to all publick acts; and if he be absent it is his own neglect, of which he shall not take advantage. Objection. That the election is

is made by the livery-men, who are a small number compared with all the citizens. Answer. 1. That it does not appear by this return, that the election is by the livery-men, but must be supposed to be by all the citizens. 2. But secondly, admit that it was so, yet every citizen is obliged to take notice of what is done by them, for the same reasons that all persons are obliged to take notice of acts of parliament. And though heretofore laws newly made used to be proclaimed, yet that was but an act of grace. 3. It is a notorious act; and in all cases where a man ought to be present in person, or by his representative, he shall take notice of all acts done there, &c. 4. The proclamation upon the Hustings is sufficient notice and agreeable to the reason of the common law. As if a *praecipe* be brought against a man, summons upon the land is sufficient. The same law of a proclamation in the county-court in case of outlaw, because the tenant is supposed commorant upon the land, and every man of the county at the county-court. So citizens are supposed present at their own courts. And if a man has occasion to be absent, he knows whether he is liable to be elected, and therefore ought to take care to be informed, and so no inconvenience to the party. But otherwise it would be very inconvenient, if it should be in the power of the citizens to withdraw themselves, so that no notice could be given, and so the office not be executed. And therefore he concluded, that this notice was good, being agreeable to the reason of the common law. Then he inveighed against the obstinacy of the defendant, for endeavouring to oppose that which had been the practice for so many years, and for which there had been by-laws of the same nature almost ever since the grant, in the time of *Edward III.* 19 *Hen.* 8. 37 *Hen.* 8. and 27 *Eliz.* And therefore for these reasons he and all his brothers the justices were of opinion, that a *procedendo* should be granted. Which was granted accordingly. And afterwards this same by-law was drawn in question in the Common Pleas, and the same judgment given there, *Pasch.* 12 *Will.* 3. between the city of *London* and *Wood*, who was fined for refusing to serve the office of sheriff, being duly elected, *ut supra.*

Every citizen is bound to take notice of what is done at their public courts.

The city of London v. Wood.

Sir William Courtney *vers.* Bower and Kingston. C. B.

Intr. *Hil.* 6 *Will.* 3. C. B. Rot. 1422. See before, 388.

IN trespass brought by the plaintiff against the defendants, upon not guilty pleaded, a special verdict was found, in which the single question was, if wreck and *flotsam* goods ought to pay custom. And after several arguments at the bar, this case having been depending for three or four years, the judges delivered their

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Wreck and *flotsam* goods shall not pay custom. Vaugh. 160, 168, 170. Molley 276. 8 edit. lib. 2. cap. 5. f. 9.

their opinions in solemn arguments. And *Nruill*, *Powell*, and *Blencowe*, were of opinion for the plaintiff, who was lord of the manor, and claimed this wreck and *jetsam* by prescription, that they ought not to pay custom. But *Treby* chief justice delivered his opinion for the defendants, being custom-house officers, that they ought to pay customs. See *Vaugh.* 157. *Meer* 224. Note, this case was tried before *Holt* chief justice at *Exeter*, he being then justice of assise there, 1696. and upon the great importunity of the King's council he permitted it to be found specially; but was clear of opinion, that no custom ought to be paid for wreck, &c. Afterwards error was brought upon this judgment in *B. R.* and after several arguments at bar by the council on both sides, the judgment of the Common Pleas was affirmed, without any other reason given by the court than the authority of the case of *Shepherd v. Gosnold* in *Vaugh.* 159. *Mich.* 13 *Will.* 3. *B. R.*

The mayor and corporation of the city of York *vers.*
Toune. *B. R.*

S. C. 5 Mod.
444, 439,
440.

Indebitatus
assumpsit for a
fine imposed
by a corpora-
tion for not
serving the
office of she-
riff, being du-
ly elected.
5 Rep. 62.

THE plaintiffs brought *indebitatus assumpsit* against the defendant for a fine imposed upon him for not serving the office of sheriff of the city of York, being duly elected according to the custom, and according to the custom fined for refusal, &c. And upon demurrer to the declaration the last paper day of this term Sir *Bartholomew Shower* for the defendant said, that the action in this case would not lie. And *Holt* seemed to incline to the said opinion. And upon motion of the plaintiff's council, that it might stay till the next term; *Holt* chief justice said, that it should stay till dooms-day with all his heart. But *Rokeby* seemed to be of opinion, that the action would lie. *Et adjournatur.* Note, a day or two after I met the lord chief justice *Treby* visiting the lord chief justice *Holt* at his house. And *Holt* repeated the said case to him, as a new attempt to extend the *indebitatus assumpsit*, which had been too much encouraged already. And *Treby* chief justice seemed also to be of the same opinion with *Holt*.

Memorandum, Charles Mountague *esquire* resigned his office of chancellor of the Exchequer, and John Smith *esquire* succeeded him.

Mich.

Mich. Term

11 Will. 3. B. R. 1699.

Sir John Holt *Chief Justice.*

Sir Thomas Rokeby *died*

26 Nov. *in this term*

after a long illness.

Sir John Turton

Sir Henry Gould

Justices.

Robbins *vers.* Robbins.

IN an action upon the case the plaintiff declared, that the de- s. C. 12 Mod.
fendant *praetextu et colore cujusdam medii processus in lege ar-* 273.
restari the plaintiff *causavit*, and to be held to special bail, S. C. 1 Salk.
without cause. Upon not guilty pleaded, verdict for the 15.
plaintiff, and now Mr. Eyre moved in arrest of judgment, that Case for ar-
the writ is not shewn, upon which the arrest was; nor is it averred, resting and
by whom it was prosecuted; and that the whole matter ought to holding to
be shewn at large, and not in this uncertain manner, *colore cujus-* special bail.
dam processus in lege, &c. Against which Mr. Carthew for the
plaintiff argued, that the cause of this action was not the suing
without cause, but the holding to special bail without cause. And
the plaintiff could not shew it specially, because the writ remained
with the officer; and therefore he could not shew it, nor what
sum was contained in it. And that is the reason that has intro-
duced this succinct way of pleading. But *per curiam*, the declara-
tion is ill; for if the cause of action is the holding to special bail
without cause, the plaintiff ought to have shewn the whole spe-
cially, *viz.* that he owed the defendant but so much, &c. and
that the defendant intending to oppress him, had caused him to be
arrested for so much, &c. and held to special bail, &c. But now
it does not appear to the court, that the sum, for which the
plaintiff

Warrant to
the bailiff evi-
dence against
the sheriff, &c.

plaintiff was arrested, required special bail, but that, being the *gist* of the action, ought to have been shewn at large. And as to the objection, that the plaintiff could not obtain a sight of the writ, he might have moved the court, that the sheriff should return his writ, and then he might have seen all. Besides, that the warrant under the hand of the sheriff to the bailiff is good evidence, &c. 2. It is not shewn, that the plaintiff was prosecuted or arrested at the suit of the defendant; and perhaps the defendant was only the bailiff, and then the action will not lie against him. And *per curiam*, this way of declaring is not introduced yet, for this is the first that they have ever seen of this sort of pleading in this manner. And therefore judgment was ordered to stay, until, &c.

Blake *vers.* West and Trench.

The place of
taking tra-
versed in re-
plevin.

REplevin of two cows. The caption was laid to be in a place called *Downfield*. The defendant avows, for that, that the place where, &c. contains two acres called *Marsh-acre* in *Downfield*, and two acres called *Stretfield* in *Downfield*, and that he was seised of them in fee, and took the cows, *viz.* one in *Marsh-acre*, and the other in *Stretfield*, damage feasant, &c. The plaintiff pleads in bar, that the defendant took the two cows in *Downfield*, and traverses the taking in *Marsh-acre* and *Stretfield* in *Downfield*. And issue thereupon, and verdict for the avowant. And now Mr. *Cartbew* moved in arrest of judgment, that the issue was immaterial, because the plaintiff has traversed the taking in the two places, which he understood to be a plea of *prisel en autre lieu*, but has not taken any notice of the damage feasant; so that though a verdict is for the avowant, yet he has no title to have return, because the damage feasant is not found, &c. *Sed non allocatur*. For that is admitted by the issue of the taking, *viz.* if they were taken there, that they were taken there damage feasant.

Stedman *vers.* Lye.

Modus for
tithes of hops,
that if the par-
son shall send
a servant to
pull some of
the hops, he
shall have the
tithe of them.
1 Vent. 61.
2 Cro. 116.
Yelv. Green
v. Austin.
Lutw. 1071.
1 Keb. 620.

MR. *Stephens* moved for a prohibition to be directed to the consistory court of the bishop of *Worcester*, to stay proceedings in a suit there for tithes of hops, upon suggestion of a *modus* time whereof, &c. there used, that if the parson send a servant, &c. to pull *aliquam partem lupularum*, he shall have the tithes of them, &c. Upon which a rule was made, to shew cause why a prohibition should not be granted. And now Mr. *Bannister* shewed for cause against the prohibition. 1. The custom is void for uncertainty, for it does not appear, how much hops ought to be pulled,

pulled, &c. 2. That it is an ill custom, because it is no benefit at all to the parson, but drives him to more pains than the law requires, to intitle him to that, which by law he ought to have in the same manner without such pains. Of which opinion was the whole court. And therefore the rule was discharged.

Helliard *vers.* Jennings.

UPON an issue directed by the court of Chancery, to be tried S. C. Carth. in a feigned action, to try whether *Thomas Jennings junior* 514. devised the manor of *Earnsey* in *Somersetshire* to *William Helliard* S. C. Comyns 90. the plaintiff, a special verdict was found, *viz.* That *Thomas Jennings* the defendant's husband was seised of the said manor in fee, S. C. 12 Mod. 276. and being so seised had issue by the defendant *Thomas Jennings junior*, Freem. 509. his only son, and two daughters, *Mary* and *Elizabeth*, now living: S. C. Wma. 557-558. That *Thomas Jennings* the father made his will the twenty-seventh of *December* 1679 in these words; I devise to my son *Thomas Jennings* and his heirs for ever all that my manor of *Earnsey* which I purchased of *Wall*; but if it shall so happen that my said son shall die without issue of his body, or before he shall attain the age of twenty-one years, then I devise the said manor to be equally divided between my two daughters *Mary* and *Elizabeth*, and their heirs for ever: That *Thomas Jennings* the father died the twenty-seventh of *December* 1679 seised as aforesaid; that *Thomas Jennings junior* entred into the said manor, and was seised *prout lex postulat*; and being above the age of twenty-one years, he made his will, dated the seventh of *April* 1695. by which he devised the said manor to the plaintiff *William Helliard* and his heirs; that he signed, sealed and published that will in the presence of *A. B.* and *William Helliard* the plaintiff, and that they subscribed their hands in presence of the testator, &c. that *Thomas Jennings junior* was also heir to his father; and that he the eighteenth of *May* 1695 died seised of the said manor in fee, &c. *et si*, &c. And Mr. *Carthew* for the plaintiff argued, that *Thomas Jennings* had all the fee in him, and therefore might well devise to the plaintiff. For the word [or] shall be construed [and] so that the remainder could not vest before *Thomas Jennings* died without issue, and under the age of twenty-one years. And to make other construction, would be to defeat the intent of the deviser; for he intended, that the issue of his son should inherit before his own daughters; but if [or] should not be construed [and] then if the son should have sons, &c. before he attained to the age of twenty-one years, and then should die before twenty-one years of age, those sons could not inherit, which would be expressly contrary to the deviser's intent: then the remainder limited over will be void. And he cited the case of *Soule v. Gerrard*, Cro.

Where [or]
shall be construed [and].

Cro. Eliz. 525. *Moore* 422. as a case in point. He cited also many cases, where [or] shall be construed [and] and where [and] shall be construed [or,] 1 *Ventr.* 62. *Hall v. Philips.* 1 *Leon.* 74. *Baldwin v. Cox.* *Plowd.* 286. *Cro. Eliz.* 362. *Pain v. Mallory.* But against this it was argued by Mr. Pratt for the defendant, that *Thomas Jennings junior* had an estate tail determinable upon the contingency of his dying before the age of twenty-one years: For the subsequent clause explains the precedent clause (*viz.* and if he die without issue of his body) and moulds the precedent general words, which would pass a fee, into an estate tail. *Littlel. Rep.* 345. Objection: That [or] shall be expounded [and]. Answer: That cannot be done here, for [or] in its genuine signification is a disjunctive, and shall not be expounded otherwise, unless the plain intent of the testator appears to be so, which does not appear here. 5 *Co.* 111. A. makes a feoffment to B. or his heirs; B. has but an estate for life, because there are no words to convey a greater estate. Besides, that it is probable here, that the deviser intended that [or] should be a disjunctive, to the end that in all events the estate should go over to his daughters, if he died before the age of twenty-one years, intending to prevent the marriage of his son before the said age, which is a good caution for many reasons. But if Mr. *Cartbew's* construction be admitted, the whole estate will not be disposed, and the devise to the daughters will be void, because it will be an executory devise to commence upon too remote a possibility, *viz.* the dying without issue, &c. And as to the case of *Soulle v. Gerrard*, he said that it would be no authority against him; for there the judges agreed, that the son had an estate tail; and though they held that the devise over, upon the dying within the age of twenty-one years, &c. would be void, because the fee was disposed before (by him) that is not law. And *per Holt* chief justice, there is no necessity to construe [or] as [and] in this case. And the case of *Soulle v. Gerrard* was adjudged to be an estate tail. And it may be it was the father's design to restrain the marriage of his son before the age of twenty-one years. But to that point the court gave no positive opinion. Then Mr. *Cartbew* argued, that this will of *Thomas Jennings* was good, notwithstanding the statute of frauds and perjuries, 29 *Car.* 2. cap. 3. which requires that such will, by which lands are devised, should be subscribed by three credible witnesses. For (by him) the plaintiff is a man of an indisputable credit. 2. Though he cannot be sworn upon a trial, yet one cannot say but that there were three witnesses to the will; and the will has been well proved by the other two witnesses. 3. There is a difference between a matter which goes to the credit of his testimony, and a matter which goes in bar of it; the first sort are excluded from being witnesses by that statute, as a man attainted of treason, &c. but where there is only a thing which bars him from

from being a witness, but does not touch his credit, it is otherwise.

4. The intent of the act was, to prevent perjuries; but this cannot be within the mischief of the statute, because the devisee being a witness could not be sworn and examined upon it, and therefore out of the mischief of the statute. 5. That this statute has been

taken with a liberal construction; as where the statute requires that the witnesses shall subscribe their names in the presence of the testator, it was held in *Sir George Sheers's case*, that where *Sir George*

Sheers being sick in bed signed, published and declared his will, by which he devised lands and tenements, in his bed in his bed-

chamber, to which an entry was adjoining, and a dining room or long gallery adjoining to the entry, and a man in the bed, if he

was raised up, might see persons in the dining room, and what they did there, the witnesses subscribed their names in this dining room, and upon the question, whether this could be called a subscription

of the witnesses in presence of the testator, according to 29 Car. 2. cap. 3. and because there was a possibility, that if *Sir George Sheers*

had been raised up in his bed, he might have seen through glass doors the witnesses subscribing their names, it was held a good will to convey the lands therein devised. But against this it was argued by Mr. *Pratt*, and held by the whole court, that this will was not

well executed according to the statute of frauds. For a man who cannot be a witness, which is the plaintiff's case, cannot be a credible witness. And the intent of the act was to prevent frauds

as well as perjuries; which intent would be evaded, if the devisee should be admitted to be a witness, who being a party interested, might probably be induced to use fraud. And Mr. *Pratt* said, that

the statute appointed three witnesses, &c. to the end that it might be done in such solemn and notorious manner, that they might see that the deviser did not suffer any imposition, being infirm as well

in understanding as in body, as all men generally in *extremis* are. And for this reason the common law would not permit one to devise his lands, without a custom. But if persons, who cannot give

evidence of their subscriptions, &c. shall be admitted to be credible witnesses, it is to admit so many dead letters to be witnesses, which intirely evades the intention of the act. And for this point the

whole court were of opinion, to give judgment for the defendant. But upon the importunity of the plaintiff's council to have another argument, *adjournatur*.

3 Mod. 259.
Sir George Sheers's case.

Three witnesses to a will, of whom the devisee of the lands in question was one.

Yates *vers.* Fettiplace.

In Chancery.

5000 l.
charged upon
land, payable
at the age of
21 or day of
marriage, the
party dies be-
fore the age of
21 unmarried.
See 2 Ventr.
366, 416.
2 Freem. Rep.
243.
Chanc. Prec.
140.
12 Mod. 276.
2 Wms. 610,
611.

A. Seised of lands in fee has issue a daughter, and by his will he charges his lands with 5000 l. for his daughters portion, to be paid at her age of twenty-one years, or day of marriage, and dies; the daughter dies at the age of six years; the second husband of the mother of the daughter takes letters of administration to the daughter, and to the mother his wife. And the question was, whether he should have the 5000 l. or whether the 5000 l. should be sunk for the benefit of the heir. And my lord chancellor *Somers* decreed for the benefit of the heir, and it was held by him, that in all cases where a man charges a sum certain, to be paid as here out of his real estate, if the daughter, &c. dies before the age of twenty-one years, the money shall be sunk for the benefit of the heir. But if a man devises a personal legacy, or such a sum to be paid out of a term for years, as here, and the legatee dies before the age of twenty-one, there the executors or administrators of the legatee shall have the money, &c. because it was *debitum in praesenti*, though *solvendum in futuro*. *Ex relatione m^{ri} Peere Williams.*

Smith *vers.* Plafs. B. R.

She was never
married, and
what is her
hopeful son?

MR. *Northey* moved for a prohibition to be directed to the consistory court of the bishop of *London*, to stay proceedings upon a libel exhibited there against the plaintiff, for having spoken these words of the defendant. She was never married, nor never had a husband, and what is her hopeful son? And Mr. *Northey* urged, that these words did not amount to the calling the defendant whore; for it is not positively alleged, that she had a son. Upon which a rule was made, that the other side should shew cause, why a prohibition should not be granted, and that all proceedings should stay in the mean time. Upon which at the day given Mr. *Cheshyre* shewed for cause, that all persons who hear these words cannot but understand, that the defendant had a bastard, and was a whore. And the court being of the same opinion, *Turton* and *Gould* justices, being only present in court, the former rule was discharged.

Cremer

Cremer *vers.* Wicket.

Intr. P. 11 Will. 3. B. R. Rot. 456.

IN an action for false imprisonment, &c. the defendant pleaded s. C. Carth. *misnomer* in abatement by attorney. The plaintiff demurred. ^{517.} And Mr. Northey took one exception to the plea, that *misnomer* ^{Misnomer may be pleaded by attorney.} cannot be pleaded by attorney. *Bro. misnomer* 5. 66. *Fitzb. nat. bre.* 27. a. 8 *Edw.* 4. 9. *Tbaloal. dig.* 365. b. For having put in a warrant of attorney by the name by which we declare against him, he shall be estopped by his warrant, to plead that he is known by another name. And Gould justice seemed at the beginning to be of that opinion, and cited the case of *Briton and Graydon* as adjudged accordingly. [See before, 117.] But Holt chief justice was of opinion, that this was a good cause to refuse the plea, but not to demur. And as to the estoppel he said, that the entry upon the roll was not the warrant of attorney, but only a *memorandum* of it, which entry was introduced in the time of King ^{Warrant of attorney, what?} James II. when *Wright* was chief justice. Heretofore they were upon a roll by themselves, and so they ought to be now. But the judges said, that they would consult with their brothers, to the end that this point might be settled. And afterwards at another day by the whole court judgment was given, *quod billa cessetur*. And Gould justice said, that if the plaintiff would have taken advantage of the estoppel by the warrant of attorney, he ought to have replied it, and relied upon it.

Rex *vers.* Fuller.

IS. came before the justices of peace, viz. two, according to ^{S. C. Cases in B. R. 309. 12 Mod.} the method directed by 12 *Car.* 2. cap. 23. *sect.* 31. and gave them information, that the defendant kept two concealed wash-backs, contrary to 8 & 9 *Will.* 3. cap. 19. This information was ^{Conviction for keeping two concealed wash-backs.} given the thirtieth of *March* 1699. Upon which the two justices issued their summons to summon the defendant, to appear before them the third of *April* following. At which day, upon his appearance, and oath being made by a credible witness, that the defendant *modo habet et custodit eadem duo privata seu concealata vasa, Anglice* wash-backs, they adjudged, that he should forfeit 20*l.* for each wash-back. This conviction having been contrived fraudulently, to avoid conviction by a later act, by which the penalty was increased to 100*l.* Mr. Attorney general *Trevor* caused the conviction to be removed by *certiorari* into the King's Bench, and ^{now}

now moved to quash it; because the information was given the thirtieth of *March*, and the oath of the witness upon the third of *April*, upon which the conviction is grounded, is *quod modo habet, &c.* which must be understood of the time of the conviction, which is a different offense from that of which the information was given to the justices; because though he had concealed vessels the third of *April*, it may be that he had not any the thirtieth of *March*, when the information was given; and therefore the evidence upon which the conviction was made, not being conformable to the information, there is here a conviction without an information. Serjeant *Levinz*, 1. The words of the oath are, *quod modo habet eadem duo, &c.* which proves that he had them at the time of the information. 2. The justices may proceed without complaint or information. 3. If complaint be requisite, they may proceed upon it *instanter*. *Holt* chief justice, 1. The evidence is of a fact subsequent to the information; and though the *eadem* may be evidence, that he had them at the time of the information, yet convictions ought to be certain, and not taken upon collection. 2. There ought to be information or complaint. 3. Though a conviction upon information *instanter* may be good, yet it ought then to be declared to be made so, and not be grounded as here upon an information which is not proved, the evidence being of a fact subsequent to it; but if it had been of a precedent fact, it had been good. The conviction was quashed. *Ex relatione m'ri Jacob.*

Convictions
ought to be
certain, and
not taken up-
on collection.

Conviction
without infor-
mation.

Harper *vers.* Davy.

S. C. Carth.
498.

Verdict, new
trial granted,
the record
made up as of
a plea of ano-
ther term than
the former
was, another
verdict ob-
tained set
aside.

12 Mod. 274.

THE plea was entred of *Easter* term. The memorandum was, that the bill was exhibited in *Hilary* term, and an imparlance to *Easter* term, and then a plea of *Easter* term, and issue joined, and verdict for the plaintiff. And a new trial granted, and the record of *nisi prius* was of an appearance and plea of this present *Michaelmas* term, and verdict for the plaintiff. And Mr. *Northey* moved to set aside the verdict, because it was another issue than that which was tried, being of a different term, and upon a plea of another term. And he relied upon the case of *Doberteen v. Chancellor*. See it before, 329. And *per Holt* chief justice, the verdict here is upon a plea and issue of *Michaelmas* term, which is intirely different from the record upon which the first verdict was obtained, and so not the same issue that was directed to be tried again, and therefore ought to be set aside. For though a new trial was granted, yet it ought to be upon the old plea. And the verdict was set aside. *Ex relatione m'ri Jacob.*

Sir William Lacon Child *vers.* Harvey.

THE plaintiff sued a *scire facias* upon a recognisance, with a S. C. 1 Salk. condition to pay money at a day certain; and issue was joined, *solvit ad diem vel non*; and a verdict at *nisi prius* was for the plaintiff. Upon which Mr. Northey moved to set aside the trial, because the *distringas* and *jurata* were made returnable *a die sanctae trinitatis in tres septimanas nisi Johannes Holt miles capitalis justiciarius, &c. vicesimo septimo die Junii prius venerit, &c.* which twenty-seventh of June was the morrow after *tres trinitatis*; but the award upon the plea roll, *tres Michaelis*. Upon which Mr. Mountague moved for leave to amend this mistake of the clerk; because that in all cases where there is a record, by which one may amend, and the amendment does not alter the point in issue, and there was sufficient authority for the trial of the issue, and the matter of the amendment is but the mistake of the clerk, the court will give the party grieved leave to amend. Now in this case the award upon the roll is right, and the issue is the same, and the judge of *nisi prius* had sufficient authority to try the issue by *Westm. 2. cap. 30.* which requires only, that a day and place certain be appointed in the country. And also it is a plain misprision of the clerk in writing *tres trinitatis* for *tres Michaelis*; and therefore within all the rules of amendments. See *Cro. Car. 595. Sloper vers. Child. Cro. Ja. 253. Dier 260. Hutton 81. and Tite v. Sir Robert Bernard, Mich. 8 Will. 3. B. R.* where in ejectment against seven defendants they all pleaded not guilty, and issue was joined; but in transcribing the *nisi prius* roll two of the defendants were omitted, and so the plea and issue which was brought to the assises, was between the plaintiff and five defendants only; and yet it was amended. Sir Bartholomew Shower argued to the same purpose; and that the court would not search in the almanack, but take it as granted that the twenty-seventh of June preceded the *tres Trinitatis*; or they would permit the plaintiff to enter his verdict, *quod postea die et loco infra contentis, &c.* Mr. Northey argued *e contra*. That the record of *nisi prius* has been frequently amended by the plea roll, but always with this caution, *viz.* if the judge of *nisi prius* had sufficient authority to try the same cause, 8 Co. 161. b. *Blackamore's case*. Therefore the roll of *nisi prius* may be amended where the *distringas* is right. In this case by the words of the *distringas* the judge of *nisi prius* had no authority to try the cause, unless the twenty-seventh of June preceded the *tres Trinitatis*; for at the *tres Trinitatis* the sheriff ought to have the jury in bank. Also there is no day upon which the judge ought to make return of his *postea*, the day of return being past before

S. C. 1 Salk.
48.
S. C. 12 Mod.
274.
Carth. 506.
Verdict set a-
side, because
the day of *nisi*
prius was after
the day in
bank in the
distringas and
jurata, and no
amendment
can be grant-
ed.

Before.

before the trial. In the case of *Tite v. Sir Robert Bernard*, the bishop of *Worcester* and others, the *distingas* was right. *Holt* chief justice, Though the day of the return was mistaken, yet if the cause was tried upon a right day *in pais*, it will be good. But here the day of *nisi prius* being an impossible day, and the judges authority confined to that, a trial upon another day will be without authority, and *Pooley's case*. therefore can never be amended. I remember the case of one *Pooley* a long time ago, where in trover and conversion the day of *nisi prius* was *die lunae in mensem Paschae*, where in truth the *dies lunae* was one day after *mensem Paschae*, being *Sunday*; and for that reason after a trial had, and verdict, it was set aside. If the *distingas* or *jurata* was right, the *nisi prius* roll might be amended; as in the case of *Tite* and the bishop of *Worcester*, there the *distingas* and the *jurata* were between the plaintiff and all seven defendants. As to the entry of it, we cannot make it agreeable to the return; for the entry upon the roll, as to the transactions of the trial, ought to be a warrant for the *nisi prius* roll. The trial was set aside.

The churchwardens of St. Anne's Westminster.

Repairs of a church.

UPON a motion for a prohibition, to stay a suit against *J. S.* for not paying a tax imposed by the church-wardens and other parishioners, for building the church of *St. Anne's* in *Westminster*; per *Holt* chief justice, a suit may be in the spiritual court for non-payment of a tax assessed for repairs of a church, but not for building a church.

Hilary Term

11 Will. 3. B. R. 1699.

Sir John Holt Chief Justice.
Sir John Turton } *Justices.*
Sir Henry Gould

The inhabitants of the parish of Kingston Bowsey *against*
those of Beddingham in Suffex.

A. A poor man was sent by order of two justices of peace from the parish of *St. Morris* to *Kingston*. *Kingston* appealed from the said order to the quarter sessions, and it was quashed, whereby *A.* was sent back to *St. Morris*. Afterwards *A.* came into the parish of *Beddingham*, which obtained an order to send him to *Kingston*. And a motion was made to quash this order, forasmuch as *Kingston* had appealed from the order of *St. Morris*, and thereupon it was adjudged, that *A.* was not settled at *Kingston*; and no parish can send *A.* to *Kingston*, being upon the said appeal totally discharged. *Curia contra.* The parish of *Beddingham* was not party to the said appeal, and therefore shall not be concluded by it. *Contra*, of the parish of *St. Morris*. Another exception was taken, that it is not adjudged, that *A.* was likely to become chargeable to the parish; but it is only said, that the justices were informed so by the overseers. *Sed non allocatur*: Because there is no need of any such adjudication. And the order was confirmed.

S. C. 2 Salk.
486, 492,
524, 527.
Carth. 516.
1 Salk. 11,
13, 20, 25.
Shaw's Parish
Law, cap. 45.
sect. 2.
No parish
shall be bound
by order of
the justices
made upon
appeal, which
is not party
to it.
No need that
there be an
adjudication
in an order,
that a man is
likely to be-
come charge-
able.

Rex vers. Paris Slaughter.

MR. Broderick made a motion, to quash an indictment found against the defendant upon 5 *Eliz. cap. 4.* for exercising the trade of a felt-maker, not having served his apprenticeship for seven years,

S. C. 2 Salk.
611. 610.
P. 1. 613.
P. 7.
Indictment
for exercising
the trade of
a felt-maker.

Wool-com-
ber.Pippin-
monger.

years, according to the statute. And his exception was, that this trade was not a trade within the intent of the act, because it was not a trade used at the time of the making of the act. And he cited many cases, where judgment had been arrested or reversed, because the trade mentioned was not within the act; which proves, that the court will take notice which trades are within, and which not. As *Cro. Car.* 499. adjudged, that the trade of a hemp-dresser was not within the act, because it did not require skill. *Pasch. 4 Jac.* 2. adjudged, that a wool-comber was not within the act. 2 *Bulstr.* 186. that an upholsterer is not within the act. And since the Revolution, it was adjudged in a case, that a pippin-monger is not a trade within the act. But *per Holt* chief justice, the averment in the indictment, that this was a trade at the time of the statute, is sufficient to support the indictment; so that the King's Bench will not quash it: For whether it was a trade then or not, is matter of fact, and proper to be tried by a jury. And the King's Bench cannot take notice, whether it was a trade within the statute or not; for there are several trades within the general words of the statute, besides those there mentioned. And as to the case of the pippin-monger, that was never determined finally. And he said, that he disapproved the case in 2 *Bulstr.* 186. of the upholsterer. See 1 *Sid.* 367. that an upholsterer is within the said statute. And the motion was denied.

Argent *vers.* Sir Marmaduke Darrell.

S. C. 2 Salk.
648.

Carth. 507.

No new trial
shall be grant-
ed after a trial
at bar, though
it be the ver-
dict against
evidence.

Sid. 58, 235.

2 Vern. 437.

Chanc. Prec.

194.

12 Mod. 93, 128.

2 Jon. 224, 225.

Smith and Dormer *v.* Packhurst, Hil. 12 Geo. 2. 7 Mod. 37.Soames and Barnardiston. Queen *v.* Warden of the Fleet, Sty. 462, 466. *Post.* 1358, 1360. 2 Wms. 563. Wms. 213.

THE plaintiff obtained a verdict in ejectment upon a long trial at bar. And now a motion was made on behalf of the defendant, to have a new trial granted, because the verdict was express against evidence. And of that opinion was the whole court. But nevertheless, after long debate, the court denied to grant a new trial, because the verdict was given upon a trial at bar, which is looked upon as very solemn. Then Mr. *Northey* moved, that the entry of the judgment should be stayed until the defendant might bring a new ejectment, by reason of the stock which was upon and in the land. But that was denied also.

Cage *vers.* Acton.

Intr. Hil. 9 Will. 3. B. R. Rot. 293.

THE plaintiff brought an action of debt for rent against the defendant as administratrix to her husband, and he declared upon a demise made to the intestate rendering rent, and for rent arrear in the life of the intestate this action was brought, &c. The defendant pleads, that the intestate in his life-time, in consideration of a marriage to be solemnized between the said intestate and the defendant, became bound to the defendant in a bond of 2000*l.* *solvendis* to the defendant *cum ad inde requisitus esset*, upon condition, that if the defendant should survive the intestate, if then the intestate should leave to the defendant 1000*l.* or if his heirs, executors or administrators should pay to the defendant 1000*l.* within, &c. after the death of the intestate, that then the bond should be void; and then the defendant avers, that the marriage afterwards took effect; she avers also the death of the intestate, and that he had not left her 1000*l.* nor had his heirs paid it to her; and then she shews, that she herself took out letters of administration of the goods, &c. of the intestate, and that *assets* to the value of 250*l.* came to her hands, which she retains in part of satisfaction of the money due by this bond; and that she hath not *assets ultra*, &c. The plaintiff demurs. This case was argued several times at the bar by Mr. Conyers and Mr. serjeant Levinz for the plaintiff, and by Mr. Carthew and Mr. Northey for the defendant. And now the judges pronounced their opinions in solemn arguments. And two questions were made in this case. 1. If debt for rent was not of a higher nature than debt due upon bond; for if it were, then this plea could not be good; because the administratrix cannot retain the *assets* for the debt due by the bond, when there is a debt of a higher nature, *viz.* a debt for rent owing by the intestate. 2. Admitting that this retainer is well pleadable in bar in respect of the nature of the debts; yet whether there is here any debt due to the defendant upon this bond, in regard that there was an extinguishment of it upon the intermarriage, or not? And as to the first point, the whole court was of opinion, that a debt due by bond, and a debt due for rent, were of an equal nature, and consequently that this plea in that respect was well enough. But *Turton* and *Gould* justices did not give their reasons, why they were of that opinion, because they thought it a clear point; save that *Gould* justice said, that he knew it twice adjudged so in the Common Pleas. But *Holt* chief justice answered to the objection made by the council at the bar (*viz.* that debt for rent sounds in the

S. C. 1 Salk.
235.
Carth. 511.
Lilly Entr.
214.
S. C. 12 Mod.
290, 1.
A feme sole
takes a bond
of a man
whom she in-
tends to mar-
ry, and after-
wards marries
him.

Debt for rent,
and upon
bond, are of
equal nature.

Payment of a debt of equal degree, before action brought, by an executor.

Extinguishment by intermarriage.

the realty, and therefore is of a higher nature than debt due upon bond, and for support of this assertion 2 *Ventr.* 184. *Newport v. Godfrey* was cited) that rent due upon a *parol* demise is a debt equal to a debt due upon bond, and that an executor or administrator may plead a retainer for such rent in bar of an action upon a bond, &c. *et sic vice versa*; and that the case in 2 *Vent.* 184. does not impugn this opinion, for there the defendant executor pleaded several bonds due from the testator, in bar of an action for rent upon a *parol* demise (for it must be intended to be by *parol*, it not being expressed to be by deed) and that he retained towards satisfaction, &c. and the plea was over-ruled. But that proves only, that they are in equal degree; for in the said case, it could not be pleaded by the executor, unless he had paid them before the action brought, or that judgment was obtained against him upon them; and therefore for that reason the plea was ill. But he might have pleaded a judgment against himself upon them, or payment, in bar of the said action; but that does not prove any superiority, but only that a specialty is equal to a debt in the realty. And though in this case the debt arises, as well in the realty, as by his specialty; yet that will not make any alteration, being a difference only in number, and not in quality. And therefore he was of opinion, notwithstanding this objection, that the plea was well enough. But as to the second point the court was divided, *viz.* *Turton* and *Gould* justices were of opinion, that this debt was not extinguished by the intermarriage, and therefore that the plea was good, and judgment ought to be for the defendant. But *Holt* chief justice held, that this debt was extinguished, and therefore that judgment ought to be given for the plaintiff. And *Gould* justice argued for the defendant in this manner following.

1. He said, he agreed, that the wife before the marriage might have released this bond by a release of all actions, because she had the right of action in her.
2. That by the intermarriage all contracts for debts due *in praesenti*, or *in futuro*, or upon contingency, which may become due during the coverture, are extinct.
1. Because the husband and wife make but one person in law.
2. Because the action is suspended. 11 *Hen.* 7. 4. *b.* *Co. Li.* 164. *b.* 8 *Co.* 136. *a.* *Dier* 140. *Cro. Car.* 373.
3. That if there was an express agreement, that they should not be released by the intermarriage; it would be void, because it would be inconsistent with the state of matrimony, the husband and wife being but one person in law, and so there is not debtor and debtee, and therefore the debt is extinct in such case notwithstanding such covenant.
4. He said, that he was at the beginning, when the case was first argued at the bar, of opinion, that this bond was extinct by the intermarriage. But now after mature consideration he was of opinion, that it might subsist by the rules of law; for the law does not

not love, that rights should be destroyed, but on the contrary for the supporting of them invents notions and fictions, as abeyance, &c. *Litt. sect. 646. Co. Li. 342.* Now in this case the express agreement of the parties created a right, and such a right as is not inconsistent with the rules of marriage, since the bond here ought not to have any effect till after the death of the husband; and therefore the law will not work a release, especially since there are two rules of law, which would be broken by the destruction of this agreement. 1 *Modus et conventio vincunt legem.* 2. That the law will not work a wrong. But since a suspension of rights in personal duties does not always work an extinguishment, as appears by the cases hereafter put, he was of opinion, that this bond was suspended only during the coverture. As 8 Co. 136. a. Co. Li. 264. b. the wife executrix of the debtee takes the debtor in marriage; the debt is not released, but the right is suspended *pro tempore*. And so here, the law preserves it from extinguishment, by interposing, and taking it into its custody, for the making of the agreement of the parties effectual. If the obligee make the obligor executor, because it is his own act, it is a release of the debt; but otherwise if administration was committed. 8 Co. 136. *Needham's case. Cro. Car. 373. Dorchester v. Webb.* Besides, that 26 Hen. 8. 7. b. proves, that the law does not absolutely work an extinguishment; for it is held there, that if there be a divorce, the wife shall have her goods again; and *Fitzherbert* and *Norwich* put the case of a bond by the husband to the wife before the coverture, and said, that though it was in suspense during the coverture; yet after the divorce the wife might sue him upon it. So here he agreed, that this debt was qualified and remediless during the coverture. And (by him) there is no solid difference between the cases of *Clark v. Thompson, Cro. Jac. 571.* and *Smith v. Stafford, Hob. 216. Hutt. 17. Noy 26. Hetl. 12.* of a promise made by the husband to the wife before the coverture, to leave her 100*l.* at his death, and this case of a bond; for as *Hobart* there observes, it is a promise presently though futurely to be performed, and has a present *lien*. And therefore as the promise was held to be in suspense, so here the debt is suspended during the coverture, for preserving an honest agreement, which otherwise would be destroyed. For the difference taken in *Noy*, and there said to be agreed by the court, *viz.* that it would be otherwise in case of a bond, no such matter is reported in *Hobart* or *Hutton*; and therefore he could not say, how far the said point of the bond was under their consideration. It is said in *Hutton*, that the law will not work a release contrary to the intent of the parties; because the marriage, which is the cause, will not destroy that which itself creates; which is the same in the case of the bond. And in *Littlel. Rep. 32.* the same with *Hetl. 12.* the promise is said to be suspended by the marriage; which he said is done here in the case

of the bond. And *Hobart* does not seem, to make any difference between a promise and a bond; and he could not believe, that there is any; and therefore he was of opinion, that the plea was good, and that judgment ought to be given for the defendant.

Turton justice argued much to the same purpose. And he agreed, that if this bond had been given for a precedent debt; it had been destroyed by the marriage, which had been a release in law. But a release in law will never destroy the provision that was intended for the wife by the express agreement of the parties. But such releases shall be taken strictly. And *Hutt.* 17, 18. *Plowd.* 184. *Hutt.* 94. *Hob.* 10. *Moor* 855. were cited by him to prove it. And he said, that this debt being in contingency during the coverture, could not be released; for the bond and condition make but one deed; and upon oyer of the condition it appears, that if the wife did not survive the husband, nothing would be due to her; and therefore being a contingency, and only a bare possibility, could not be released. As 5 Co. 70. b. *Hoe's* case. A man cannot release to the bail in the King's Bench before judgment against the principal. And therefore if it could not be released by a release in fact, no more could it be released by a release in law. And a bond cannot be sued until the condition is broken, which in this case could not be during the coverture; and therefore this debt is qualified. Then he cited the aforesaid cases cited by *Gould* justice concerning the promises, and also 2 *Sid.* 58. the roll of which he had seen, and which is entred *Mich.* 1657. *Rot.* 629. *sup. banc.* *Hoblin v. Lupart*, where the case was thus; debt was brought upon a bond by *Hoblin* a stranger against *Lupart*, of which the condition was, that *Lupart* should perform covenants in certain marriage articles, in which *Lupart* covenanted with his wife before marriage, to leave to her, &c. if she should survive him; and if he should survive her, that he should pay to the executors of his wife 400*l.* *Lupart* pleaded there, covenants performed; *Hoblin* replied, and assigned a breach, that he had not paid the 400*l.* &c. and judgment was entred for the plaintiff, as appears upon the record. And this case he urged as strong in point, together with the arguments and reasons therein used in 2 *Sid.* 58. And as to the objection, that this was *debitum in praesenti*, &c. He answered, that that was rather sound than substance. And he cited *Litt. Rep.* 87. that by a release of all demands a bond with condition to perform covenants shall not be released, before the covenants are broken; and yet it is *debitum in praesenti* as much there as in this case. But a release of the covenants would discharge the bond. *Dier* 57. And he cited the words of *Henden* in *Littleton's Reports*, that it is not *chose in action*, but the possibility of a *chose in action*. And he relied upon the case of *Hancock v. Field*

v. Field there cited, as a case in point. [But see *Cro. Jac.* 170. 2 *Roll. Abr.* 407. that the said case was an action of covenant, and not debt upon a bond with condition to perform covenants, as it is there cited.] And therefore he agreed with *Gould* justice, that judgment ought to be given for the defendant.

Holt chief justice argued *e contra* for the plaintiff, viz. that the bond was extinguished by the intermarriage. And the foundation of his opinion was, because it is an immediate debt due from the sealing of the bond. *Litt. sect.* 512. and the reason which *Coke* in his comment upon *Littleton* 292. *b.* gives, why a release of all actions before the day of payment will discharge it, though no action can be maintained upon it until after the day of payment, is, because it is a *chose in action*. And then if it is a present debt, the question will be, whether the condition will make any alteration. The nature of the condition therefore ought to be considered; and the condition here is a subsequent condition, and therefore cannot diminish, alter, or qualify the debt; but the debt will have the same existence that it had before. And in its nature it cannot be a subsequent condition, unless there be precedent debt, to which it was annexed. And the difference is put in 5 *Co.* 70. *b.* *Hoe's* case, as to the matter of the release, between a duty certain with a condition subsequent, and a duty uncertain to be reduced to a certainty upon a condition precedent; the first is releasable before the day, the second not. And to say here, that this is not a present debt, is expressly contrary to the words of the bond, viz. that the obligor binds himself in 200*l.* to be paid when he should be required. The condition goes in defeasance, but does not suspend the debt, for that would make the condition repugnant. And if the breach of the condition were to raise the debt, it ought always to be shewn in the declaration, which is against constant experience; and yet it ought necessarily to have been shewn, if it raised the debt, as they always do in case of a condition precedent. And as to the objection, that the defendant might have *oyer* of the condition, and then it becomes part of the declaration. He answered, that that did not compel the plaintiff, to shew a breach of the condition; which nevertheless ought to be done, if the breach of the condition was necessary to raise the debt. But the reason why there is *oyer* of the condition is, because it is part of the same deed; but that does not drive the plaintiff to alter his declaration. If the defendant says nothing, or demurs; the court must give judgment upon the bond, without having any regard to the condition: but if it appears upon the whole matter, that the condition is not broken, the court cannot give judgment for the plaintiff. Then since it is an immediate debt, by the intermarriage it is discharged. 1. Because the husband can-

The effect of
the condition
of the bond.

not

not be indebted to his wife, for they are but one person in law. 2. The husband might pay the money due upon the bond, without having respect to the condition, and that would discharge the bond. 11 Hen. 4. 43. which since he cannot do to his wife, such payment being impertinent, as if the right-hand should pay to the left; for this reason it is released. 3. The intermarriage is an actual payment, because the husband is intitled to receive the money. And when the person who ought to pay the money, is the same with the person who ought to receive it; it is in law a payment. Suppose a stranger, who was bound to the wife *dum sola*, would pay the money; he ought to pay it to the husband: then if the husband be debtor to the wife *dum sola*, and would pay, &c. after marriage he must pay himself. If a stranger had been bound to the wife in a bond with the same condition as here, a release by the husband would have discharged the bond. Co. Li. 264. b. Plowd. 184. Woodward v. Darcy. The law books do not make any distinction between bonds, in which there is a precedent duty, and others; *et ubi lex non distinguit, nec judices distinguere debent*. And therefore he held, that the bond was discharged. If this had been a single bill, statute, or recognisance, with a defeasance of the same purport as the condition of this bond (he said) that without doubt the intermarriage would have released them: yet the statute, &c. would have been as much qualified by the defeasance, as the bond here by the condition; and the agreement of the parties had been the same in both. The only difference is, that in the case of the bond the defeasance is contained in the same deed, and therefore the deed being in court one may have *oyer* of the condition; in the other case the defeasance is in the hands of the defendant, being in another deed, and therefore there cannot be *oyer* of it; but yet in both cases the defendant ought to plead the condition or defeasance; and therefore in both cases the law is the same.

Objection. If the executor of the obligee marries the obligor, the debt is not extinguished.

Answer. That depends upon different reasons. For 1. The difference of the rights there preserves the debt from extinguishment. As where a man has a term as executor, and purchases the inheritance, the term is not extinguished. Co. Li. 264. b. 338. b. 2. If that should be an extinguishment, it would be a wrong to creditors, and amount to a *devastavit*, which an act in law will not do. 8 Co. 136. a. And things shall be extinguished between the parties, which yet shall remain, and have existence, as to strangers. As if a tenant for life grants a rent-charge, and then surrenders to the reversioner; or if a man, who has a rent in fee,

ac-

acknowledges a statute, and then releases to the terretenant, the estate for life in the one case will continue as to the grantee of the rent, and the rent in the other case as to the conusee. But if the husband pays debts of the testator with his own money, amounting to the sum in which he was bound to the testator; that will amount to a release of the debt, because it is an honest payment, and prevention of a wrong.

A woman executrix of the debtor marries the debtor, he pays debts of the testator to the sum.

Objection. The intermarriage will not destroy that which itself supports.

Answer. That the bond is not supported by the marriage, but by its own efficacy. The bond was made in consideration of an intended marriage, but it had its full force and effect instantly upon the sealing and delivery.

Objection. That the law will not do wrong.

Answer. That this was the act of the wife herself, and therefore she is not injured. And this is no more, than that she did not well understand what she was going to do, and there is no third person in the case.

Objection. 26 Hen. 8. 7. b. That a wife after a divorce shall have her goods again, and the bond would revive.

Answer. He agreed the said case; because the divorce, being a *vinculo matrimonii* by reason of some prior impediment, as precontract, &c. makes them never husband and wife *ab initio*: But if the husband had made a feoffment in fee of the lands of his wife, and then the divorce had been; that would have been a discontinuance as well as if the husband had died; because there the interest of a third person would have been concerned: but between the parties themselves it will have relation to destroy the husband's title to the goods. And it proves no more than the common rule, viz. that relation will make a nullity between the parties themselves, but not among strangers.

And as to the objection made by Mr. Justice Turton, that there is nothing here to be released, because it is but a contingency, and a bare possibility. He answered, that that avails nothing, because a release of the condition will not release the bond, but they must release the bond itself.

He agreed also the cases of *Smith v. Stafford* and *Clark v. Thompson*, that the intermarriage would not extinguish such a promise, though

Hutt. 17. Noy 26. Cro. Ja. 571.

though *Hobart* is of a contrary opinion. But there is a difference between the said cases and this present case, because the promise must raise a future duty upon a contingency; so that there is nothing due there, nor ever was, and it is a question whether there ever will be. In an action upon the promise all the special matter must be shewn in the declaration, but otherwise in the case of a bond. Pleading, though it does not make the law, yet is good evidence of the law, because it is made conformable to it. If therefore in the one case there is no need to shew a breach, and in the other one must shew it; that proves, that in the case of the bond the duty arises immediately, and is defeasanced by the condition; but in the other case, it arises upon the performance of the condition, which ought to precede it; and consequently the cases are as different as a condition precedent and subsequent.

He said also, that there is no difference between the case of *Lupart v. Hoblyn*, which is covenant, 2 Sid. 58. and the case of a promise. For in covenant one must shew the special matter, and assign a breach, as one ought in that of a promise. And a release of all demands will not discharge the covenant, before it be broken; as it will not discharge the promise before the time of performance; but it will discharge a bond before the condition broken: but the *lien* of the bond, if it was upon condition precedent, would be of the same nature. If a stranger promised to a woman, that in consideration that she would marry such a man, he would pay her so much if she survive her husband; the husband could not have released this promise, because nothing could become due during the coverture; but when the wife has a duty, which may become due during the coverture, the husband may discharge that, according to *Lampet's* case. 10 Co. 46.

The reason given in 2 Cro. 571. *Clark v. Thompson*, why the marriage of the promissor with the promisee is no discharge of the promise, viz. because the husband could not release it, ought to be understood of a promise made by a stranger; and those words ought to be added, as appears by the reason of it; but in case of such a bond the husband might release it. In *Yelv.* 156. *Belcher v. Hudson*, it is insinuated, as if the husband might have released such a promise made by a third person; but the book there is nonsense; and in the same case, *Cro. Ja.* 222. the only question is there, whether it be released by a release of all demands, and no consideration had of the case upon the point of the marriage.

Noy, in his report of the case of *Smith and Stafford*, reports that it was said by *Warburton*, that it would be otherwise in the case of a bond, and that the whole court agreed it; and nevertheless they resolved

resolved otherwise in the case of a promise: which proves, that it must necessarily be, that they grounded themselves upon the difference between a bond and a promise, or otherwise their resolution will be contradictory. And one must consider the whole case, and not disallow the distinction, and agree the resolution; for that would be to agree the conclusion, and deny the premises.

Objection. The intent and agreement of the parties.

Answer. That the intent of the parties cannot alter the rules of the law, and make an immediate present *lien*, not to have any efficacy.

Besides that, he said, in such a case as here the Chancery will not give relief, as appears in *Chanc. cas.* 21. lady *Darcy* and *Chute*. Much less ought the King's Bench upon equitable considerations to give judgment against the rules of law. And therefore for these reasons he was of opinion, that judgment ought to be given for the plaintiff. But judgment was given for the defendant by the other two judges. Afterwards error was brought upon this judgment.

Badger *vers.* Lloyd.

Intr. *Trin.* 9 *Will.* 3. B. R. Rot. 374. Salop.

Ejectment. Upon a special verdict the case was thus. *John* S. C. 1 Salk. 232. *Lloyd senior* seised of the lands in question in fee, conveyed them by lease and release, to the use of himself for ninety nine years if he should so long live, remainder to *John* his son for ninety nine years if he should so long live, remainder to *Elizabeth* wife of *John* the son for her life, remainder to trustees and their heirs during the lives of the two *Johns* for preserving the contingent remainders, remainder to the first, &c. sons of *John* the younger in tail male, remainder to *John* the elder in tail male, remainder to *John* the elder in fee. *John* the elder had issue *John* the younger, *Thomas*, *Paul*, and *Peter*. *John* the elder made his will, and reciting the settlement aforesaid, devised the said lands in question, after the death of *John* the younger without issue male, to *Thomas*, and after the death of *Thomas* without issue male, to *Paul*; and if *Paul* should die without issue male, and none of his brothers living, then to *Peter* and his heirs for ever. And in the will there are these words, *viz.* "Lastly my will and meaning is, that all my estates in lands whatsoever shall come and descend unto my name and posterity, as is before specified, and not to strangers; and which soever of my sons shall survive, and live longer than" all

S. C. Comyns 62. Devise to A. in tail, remainder to B. in tail, remainder to C. in tail, and if C. dies without issue, A. and B. being dead, then to D. in tail; this is a remainder vested in D. and not contingent.

" all the rest of his brothers, then he to possess and enjoy all my
 " estate to him and his heirs for ever; yet if it shall so happen
 " (as I trust in God it will not) that none of my sons shall have
 " issue male, but daughters, then I will that their daughters shall
 " inherit my estate among them." *John* the elder died. *John*
 the younger suffered a common recovery, to the use of himself
 for life, remainder to his wife for life, remainder to the heirs males
 of their two bodies, remainder to the use of the will of *John*
 the elder, &c. And after several arguments at bar, *Holt* chief
 justice delivered the opinion of the other two judges and his own
 (*Rokeby* justice dying last term.) The question is, whether the re-
 mainder limited to *Peter* be a remainder contingent or vested. If
 it be contingent, then the lessor of the plaintiff has no title; if it
 be vested, then he has a title. And we are all of opinion for the
 plaintiff. The case is no more than this; *John* the elder settles
 the lands in question to the use of himself for life, remainder to
John the younger for his life, remainder to the first, &c. sons of
John the younger in tail male, remainder to *John* the younger in
 tail male, remainder to *John* the elder in tail male, remainder to
John the elder in fee; then the elder *John* by his will devises the
 lands after the death of *John* the younger without issue to *Thomas*
 in tail male, remainder to *Paul* in tail male; and if *Paul* dies
 without issue male, none of his other brothers living, then to *Pe-*
ter and his heirs. It is urged, that these words [and none of his
 other brothers living] put the remainder in contingency. But we
 are of the contrary opinion, viz. that it is vested. For if these
 words had been omitted, it had resembled all other limitations of
 remainders, and the words [none of his other brothers living] do
 not by any means qualify the remainder, but amount to no more
 than what was said before; for remainders being limited to *Thomas*
 and *Paul* before, precedent to this limitation to *Peter*, it could
 never take effect so long as *Thomas* or *Paul* lived; and therefore
 these words make no addition to the will, and therefore cannot
 make a contingency; for so long as *John*, *Thomas*, or *Paul*, lived,
 the remainder to *Peter* could not take effect: and if these words
 should be taken so strong, as to make a contingent remainder, they
 would destroy the estate tail to *Thomas*, which is expressly given
 by the will; for if *Thomas* had issue a son and died, and then *John*
 died without issue, and then *Paul* died without issue, this contin-
 gent remainder would vest in *Peter*, and defeat the issue of *Thomas*,
 though an estate tail was expressly given to *Thomas* by the will;
 which is the express case of *Spalding v. Spalding*, Cro. Car. 185.
 where lands were devised to *B.* in tail after the death of *A.* and if
B. died in the life of *A.* then *C.* should be his heir; *B.* had issue a
 son, and died, living *A.* and it was adjudged, that this should be
 expounded, if *B.* died without issue living *A.* and not by way of

Irrot. Mich.
 5 Car. 1.
 Rot. 609.

contingent remainder, because then it would abridge the former express limitation; but that it was a remainder vested to take effect upon the death of *B.* without issue. And *Cro. Ja.* 415. *Webb. v. Irrot. Hil. Herring*; devise to his son after the death of his wife; and if his three daughters, or any of them, should survive their mother and brother and his heirs, that then they should have it for their lives; two of the daughters died in the life of their brother: adjudged, that this was not a contingent limitation, but only a direction of the time when it should commence. So here, these words are explanatory, when the remainder to *Peter* shall take effect in possession; and not restrictive, that it shall not take effect, unless that happens. Then if one considers the other words of the will [Lastly, &c.] which are in effect, that his desire was, that his estate should descend to his name and posterity, and not to strangers, and that the survivor of his sons should have all; and that if his sons left only daughters, that then they should take equally: Now if this should be construed a contingent remainder, it would defeat the testator's design, and let in the daughters before the sons; for if *Paul* died without issue before *Thomas*, and *Peter* died leaving issue a son and a daughter, and *Thomas* died without issue, the daughter would take this estate before the son, and defeat the will of the testator, that it should descend to his name; and so of collateral kindred. ["*Quaere* of this last, if it be not mistaken by the "reporter?""]

Objection by serjeant *Wright* in his argument, that these estates devised by the will are executory devises and void; for *John* has an estate tail by the limitations in the settlement, and these devises ought not to take effect but upon his death without issue, and so the devises are executory and void. Answer: That indeed these devises would be void, if there was no more in the case. It is *Pell and Brown's* case, in *Cro. Ja.* 590. But as the case is here, a man seised of a reversion expectant upon an estate tail devises it, after the death of tenant in tail without issue, to another in tail; this is not an executory, but an immediate devise; and the words [from and after] are only a declaration when it shall take effect in possession. And it resembles the case of *Pasmere v. Prowse*, 10 Co. 107. a. where a man makes a lease for years, if the lessee shall so long live, and afterwards grants the reversion to another, *habendum* to the grantee for life, *cum per mortem aut forisfacturam* of the lessee, *aut aliter acciderit*; and it was resolved, that the reversion passed immediately; and the *cum per mortem*, &c. is as much as to say, to take effect in possession *cum per mortem*, &c. The same point adjudged 3 *Cro.* 323. pl. 14. which is confirmed, 1 *Saund.* 151, 152. So here, though the estates devised are after the death of *John* without issue, yet the reversions pass immediately, only they

Executory devise.

they will not take effect in possession till then, but nevertheless present estates in reversion do pass. In fact, if *John* had not had any estate tail in the land, but the devises had been after the death of a stranger without issue, these had been executory devises, and void by reason of the remoteness of the possibility; but here they are limited after the determination of the particular estate.

Difference between a remainder and a reversion.

Objection. That the estate tail in *John* the elder will destroy this devise. As if *A.* was tenant for life, remainder to *B.* his son in tail male, remainder to *A.* and the heirs male of his body, remainder to *A.* in fee, *A.* has issue another son *C.* and devises his remainder, after the death of *B.* without issue, to *C.* his second son in tail male. It was objected, that this devise could never take effect, and therefore that it was ill, because the estate tail in the father will descend in the same order, and interpose between the estate devised by the will, and the devisees respectively will take the old intail by descent, which will exclude the new estates limited by the will; and the devise of a remainder, which can never take effect in possession, is void. So here, because the tail devised by the will cannot by any possibility take effect in any of the sons, because they ought to take by the old intail as heirs males to *John* the father, and the devise gives no more, nor otherwise, than they take by the intail, and therefore it is void. The which is apparent by the comparison of the descents; for the estate tail devised by the will expires *aequis passibus* with the estate tail in *John* the elder; and therefore if the fee in *John* the elder, out of which this devise takes effect, was a remainder, it would be void. But here in this case it is a reversion; and though such a bequest of a remainder would be ill, yet it will be good of a reversion, though it could never by any possibility take effect in possession. And this is the express difference in *Cholmley's* case, 2 Co. 51. a. And the reason is, because tenant in tail holds of him in the reversion, and he of the chief lord. If a man makes a feoffment in fee, to the use of himself for life, remainder to his first son, &c. in tail, remainder to himself and the heirs males of his body, remainder to himself and his heirs, he has but a reversion; and though the tail devised out of it can never take effect in possession, yet it is a good devise of such estate in reversion; for *John* the brother will hold of *Thomas*, and *Thomas* of the chief lord, and the lord shall avow upon *Thomas modo et forma praedictis*; so that it creates a seignory and tenancy, though it can never take effect in possession, and this is a sound diversity. But then supposing that this fee in *John* the father had been a remainder, and so the devises in the will void, yet the lessor of the plaintiff will have a good title; for the words of the will sufficiently explain the intent of the testator, and the limitations will be good; but by matter *dehors*, viz. that the devisor was tenant

nant in tail, and has not given any larger estate, so that when the common recovery comes and docks the estate tail of *John* the elder, and so removes the impediment, the estates limited in the will being good in point of limitation, the *remotio impedimenti* revives the will, and the title of the lessor of the plaintiff. And therefore judgment was given for the plaintiff. *Ex relatione m'ri Jacob.* Afterwards upon error brought in the Exchequer-chamber this judgment was affirmed. *Ex relatione m'ri Willelmi Tully.* And afterwards a writ of error was brought upon these two judgments in parliament, and *Easter* vacation 13 Will. 3. the judgment was affirmed there. *Ex relatione m'ri baronis Bury.*

Rex *vers.* Knight and Burton.

HOLT chief justice delivered the opinion of the court in this manner, after motions had been several times made in arrest of judgment after verdict for the King. The informations are very like the one to the other, and therefore I shall join them together. This against Mr. *Knight* is an information by the attorney general, shewing, *quod cum quinto Junii octavo Will. 3.* three or more of the commissioners of the treasury caused divers bills to be issued at the receipt of the Exchequer, according to the form of the statute in the said case made and provided; Mr. *Knight nuper receptor generalis custumarum existens*, and not ignorant of the premises, fraudulently and with design to make great gains to himself, falsely indorsed, or caused to be indorsed, twenty of the said bills, *quasi receptae essent pro custumis*, and the same day and year paid them into the receipt of the Exchequer, as if they had been truly indorsed. There is a difference in that against *Burton*, viz. that he is shewn to be *nuper receptor excisae*, and the false indorsement to be as received for customs. Upon not guilty pleaded by the two defendants to these two informations, Mr. *Burton* was found guilty of the whole, and Mr. *Knight* was found guilty as to the false indorsement, and not guilty as to the payment of them in. And we are of opinion, that judgment ought to be arrested. I will speak to them both together, since the one very much resembles the other. But the subject being unusual, I fear that I shall not make myself intelligible; but I will do my endeavour, that the reasons of our judgment may be apprehended. And before I proceed to the particular objections, I will consider what particular facts with relation to these Exchequer bills are criminal. 1. It is a crime in a receiver, who has the King's money in his hands, to pay the King in Exchequer-bills instead of money. 2. If he writes the name of any person upon the back of the bill, intimating that it was paid into his hands, where it was not, it is a great crime. 3. If

S. C. 1 Salk.

375, 371.

Informations

for falsly in-

dorsing ex-

chequer bills.

Farr. 151.

4 Rep. 42. b.

Cro. Jac. 19,

20.

5 Mod. 137,

138.

6 Mod. 289.

Receiver pays

in exchequer

bills, when he

has money.

Indorsing the

name of an.

other falsly.

Payment of
the King in
bills, where
it ought to be
in money.
In what cases
exchequer
bills are pay-
able as money.

3. If by agreement between the receiver, &c. and the teller, the receiver pays the King in bills, where he ought to pay him in money, it is also a great crime. As to the first, though they are payable as money in many cases, yet they are not so in all. As they are not payable as money by collectors, unless that they were received by them for the aids of which they are collectors; so if they are paid to a receiver for one aid, they are not money to discharge the receiver of another aid. As if bills be paid to the receiver of the customs, they shall not be money to discharge the receiver of excise, but only to discharge the customs for which they were paid. This appears by the first act, 8 Will. 3. cap. 6. and by the second act, cap. 20. But it is objected upon one clause in the second act, fol. 384, 385. that a receiver may buy bills, and pay them to the King instead of ready money of the King's in the hands of the receiver, which he may detain; and they insist upon the general words at the end of the said clause. But that can never be the intent of the said act; but the words ought to be understood respectively, otherwise it would make a confusion in the King's revenues. For according to such strict construction, if a man should owe money to the excise-office, he might pay it in exchequer-bills to the receiver of the customs. And also it is against the authority of the act of parliament to keep the King's money, and pay him in bills; for if a receiver retains the King's money, and pays him in exchequer-bills, he frustrates the design of these bills, making the want of money greater, instead of promoting the circulation of it; and that is an imbezilment of the King's money.

False indorse-
ment of a
name.
Forgery.

As to the second, that it is a falsity, and though no advantage be made of it, yet it is an evil thing, because advantage may be made of it. As if a man forge a false deed, in which the estate of J. S. is mentioned to be conveyed to J. N. though J. S. be not damnified by it, yet it is *crimen falsi*, and punishable by reason of the tendency that it had to have defrauded him.

Payment of
the King in
bills, where
it ought to be
in money.

As to the third, it is a fraud in the receiver, to pay in bills, when he ought to pay in money; and in the teller, to receive it, when he ought to receive money; and therefore they cannot be received, without the mark appointed by the act of parliament first impressed upon them.

But here there is none of these facts charged upon either of these defendants in these informations. The one is not said to be cashier, nor the other receiver, at the time when these bills were paid into the exchequer; but only *nuper* cashier, and *nuper* receptor; nor is it said, that the name of any one was put upon these bills, nor any combination laid between these defendants and the tellers.

2. But to be more particular. These informations are, that the one being late receiver of the customs, and the other of the excise, falsly indorsed divers exchequer bills, as if they had been received for customs: and secondly, that they paid them into the exchequer as if they had been truly indorsed. *Burton* is found guilty of both; *Knight* only of the false indorsement.

1. To consider the false indorsement. I suppose, that the intent was, to charge them with a fraud. But it does not appear, that it could be any fraud. If it be, it must signify the setting the mark appointed by the act of parliament; but a false indorsement does not signify that. The mark appointed is, the writing of the name of the party who paid it in; but a false indorsement does not import that: and then if it be so, there is no fraud in making a false indorsement, because it is not the mark appointed by the act. An indorsement is only the writing upon the back of any thing, which was complete before; but does not imply a signing. As in case of a bond, as the old practice was to make them in parchment, and to write the condition upon the back; when the party came and prayed oyer of it, *petit auditum scripti obligatorii praedicti, petit etiam auditum indorsamenti*; and yet the name of the party is not set to the condition: and therefore the word indorsement may be true, though no person put any name upon the bill: and then it might be falsly indorsed, and yet not have the sign required by law. In fact, if the name of any body had been set to the bill, that had been material.

Objection: Since it is laid as if received for customs, that makes it apparent what the indorsement was. Answer: That the [as if], no body can understand what it means.

Objection: It is a falsity, and therefore punishable. Answer: If it does not tend to the deceit of any one, it is no crime. And it could not deceive any one here, because it is not the sign. I cannot imagine why this word indorsement was used, since there is not any such word in the act of parliament. One cannot make it good, but by argument or inference; and argumentative informations are ill, for that very reason, because all charges ought to be shewn precisely in pleading. It ought to have been laid, that the defendants set the name of such a one to the bill, *ubi revera* no such person set his name to the bill; or *ubi revera* there was not any such person. If it had been so, the information had been good, and had charged the defendants with a manifest cheat.

Argumentative informations are ill.

*Ac ft.**Quasi.*

Suppose that the indorsement had been, as if they had been received for customs, yet that would not have been good, to lay it with an *ac ft.* As in case of an information or indictment for forgery, it would not be good to say, that the defendant forged a false deed, *quasi* a conveyance of such lands. So in perjury, that which was sworn ought to be shewn, and not with a *quasi*. So here, it ought to have been laid, that the defendant made a false indorsement, *continens, &c.* according to the matter of fact, with which he was to be charged.

A private person makes a false indorsement, no crime, because only to the prejudice of himself.

But now if we should be indulgent, and contrary to all the rules of law intend that this false indorsement was the setting the name of some body to the bill; let us consider, whether this would make it good. If the defendants had been receivers, or had had money of the King's in their hands, when they falsly indorsed these bills, how far that would have made them criminal; but that is not laid here. So that the case is no more, than that a private person, no officer, nor having any money of the King's in his hands, makes a false indorsement upon these bills. Whatsoever it would be in the case of an officer, or a man who had the King's money in his hands, yet it cannot be a crime in him, to make such indorsement. For first the bills are payable into the Exchequer, without any indorsement. But then suppose they are falsly indorsed, that will not tend to the damage of the King, but of the party. For suppose, bills should issue the first of *January*, and they are falsly indorsed, paid into the customs the first of *April*, that will make appear, that they were there all the time of *April* until the time that he comes to pay them, and for all the said time he shall lose his interest, for they cannot carry interest again, until they are indorsed, paid out. And if this false indorsement does not tend to the damage of the King, it cannot be a crime. As the case in *Noy 99.* where the obligee diminished the sum, it had been forgery in a stranger, or in the obligee if he had enlarged it; but in regard that the obligee by diminishing the sum did no damage but to himself, it was held not to be forgery. So here, the false indorsement in this case is not criminal, because it is no damage to the King, but only to the party in the loss of his interest.

Objection. It is a damage to the contractors, by making this bill a specie-bill. Answer. 1. It does not appear, that there were any contractors. We ought to take notice, that there might be such, because the act of parliament says so, but not that there were such in fact; and therefore if they had relied upon that, it ought to have been shewn; because we cannot take notice judicially, that

that there were any contractors. And if no person appears to be damnified by this false indorsement, we cannot judge it to be a crime. But secondly, the contractors are not obliged to change these bills, until they are paid out of the Exchequer again, which is not shewn in this case to have been done, nor is there any sign shewn of their having been issued again; for upon their payment out again, the name of the payer out ought to be set to them with the day of the month; and if that had been shewn, then perhaps it might have been a crime, but yet not till then. This is sufficient for the first part of the information.

As to the second part, which relates to *Burton* singly, viz. Payment of these bills into the Exchequer, *ac si* they had been truly indorsed; I do not well understand the meaning of the expression. For if they had been truly indorsed, and truly paid for customs, they could not have been paid into the Exchequer by *Burton*, who was cashier of the excise. They might have been paid by *Knight*, as received by him for customs; but *Burton* could not pay a bill paid for customs, in discharge of money received by him for excise; and the officers of the Exchequer ought not to have received them, and therefore it is no fraud, but a mere impertinent falsity. And it is no more a fraud, than if a man should sell a horse which has but one eye, instead of a horse which has both his eyes. And since the teller ought not to have received it, if he did receive it, it is his plain mistake. 2. It is not said, that he paid these bills into the Exchequer, instead of money of the King's which he had received for excise. We cannot intend, that he was an officer, because he is laid to be *nuper* cashier of the excise; nor can we intend, that he had any money of the King's in his hands, because it is not said so; so that he paid it meerly as a private man: and the bill, notwithstanding the false indorsement, is as good as it was before. And if it was falsely indorsed, and paid as a private man, he has not aggrieved any body but himself; so that I cannot see, in what the offense consists, or what it is. Possibly we might intend some fact, which might be a sufficient foundation for an information; but in this information there is not one word, that looks like any such fact. And therefore judgment ought to be arrested. And it was arrested accordingly. *Ex relatione m'ri Jacob.*

Davy's case.

SIR *Bartholomew Shower* moved for a prohibition, to be directed to the court of Chancery, in a cause in which the earl of *Stamford* was plaintiff and *Gibbons* defendant; and it was on behalf

Prohibition to the Chancery, to stay a sequestration. Show. Parl. Cal. 63. Arg.

behalf of *Davy*, who was purchaser under *Gibbons*, whose lands were seised upon a sequestration, for levying so much money decreed against *Gibbons* upon account there. And he founded his motion upon this, that the court of Chancery has not any jurisdiction but in personal matters; and therefore this sequestration affecting land, and binding the interest of it, is against *magna charta*. But the only process which they can issue there, is against the person. And though, where by reason of some trust the title of land comes in question, and therefore the Chancery, to compel an execution of the trust in performance of their decrees have used to sequester the lands, which was the first original of this process; yet there is no colour for it, when the original cause of suit is a mere personal duty.

Holt chief justice. It is *Davy*, for whom you make this motion, and therefore you are not proper to have a prohibition for him; but if he be turned out of possession, he ought to bring his action at common law. For the lands are sequestered as the lands of *Gibbons*, and it is but his suggestion, that they belong to him; and he would have a prohibition, because he has made application to the court, and they will not relieve him. If you make a motion for *Gibbons*, it will be another question; but as to *Davy*, he cannot have a prohibition. *Ex relatione m'ri Jacob.*

Bringar *vers.* Allanson.

*Scire facias in
hac parte.
Ante 323.*

Want of shewing
where the
court was held
is but form.

IN *scire facias* against the defendant as bail, &c. the defendant demurs. And Mr. *Carthew* took exceptions to the *scire facias*. 1. That it was *in hac parte*, where it ought to be *in ea parte*. But *per Holt* chief justice, in case of a *scire facias* against bail *hac parte* is the most proper. 2. Exc. That it does not appear in the *scire facias*, where the court was at the time of the judgment; which ought to be shewn, because it is an ambulatory court; and if it be not shewn, one cannot know, to what place one ought to send a *certiorari*. 27 *Hen.* 6. 10. b. 3 *Cro.* 504. *Yelv.* 227. But *Holt* chief justice said, that he always thought that exception very flight, *viz.* to say that one does not know where the court is, but it has been held cause of demurrer in both old and new books. But yet it is but form, and therefore should have been shewn as cause of demurrer. Judgment for the plaintiff. *Ex relatione m'ri Jacob.*

Newton

Newton *vers.* Rowland.

IN an action upon several promises against the defendant as executor to J. S. he being an attorney, the defendant pleaded his privilege in abatement. The plaintiff demurred. Sir Bartholomew Shower for the defendant said, that an executor attorney being plaintiff has no reason to have his privilege; but it seems otherwise, where he is defendant; for there it seems to be as reasonable, as when he is sued in his own right. Broderick for the plaintiff. Gage's case, Hob. 177. is express in point to the contrary. Holt chief justice. His privilege extends only to actions in his own right. All the authorities are so, and it has been often held so. *Respondes ouster nisi, &c. Ex relatione m'ri Jacob.*

Desborough *vers.* Kelby.

ERROR upon a judgment in *assumpsit*, where the plaintiff declared upon several promises; and in the count upon the *in-simul computassent*, no time was laid when, nor place where, the account was made between them. Holt chief justice. It is the same thing, as if a man should declare, that at Cambridge the defendant was indebted to him for goods sold, and not say where they were sold; it ought to be, *adtunc et ibidem venditis*. The judgment ought to be reversed. *Ex relatione m'ri Jacob.*

Doyley *vers.* Burton.

DEBT upon bond conditioned to perform an award. The defendant pleaded, no award made. The plaintiff replied, and shewed the award, and assigned a breach, &c. The defendant demurred. And Mr. Eyre took exceptions to the award. 1. That the award did not pursue the submission; for the submission was, that it should be ready to be delivered at London; and the pleading was, that the arbitrators made the award at Westminster ready to be delivered at London, like the case in 2 Cro. 577. Holt chief justice. If it be made, it is ready to be delivered; and therefore if [ready to be delivered] had been omitted, it had been well enough. The alleging the award to be *de et super praemissis* supplies all averments. 2. Exception. That the arbitrators had awarded the bonds of submission to be surrendered, which exceeded their authority. Holt chief justice. As to that, it is void; for they could not award any thing concerning them; and if as this case is, they

had awarded general releases to have been given after the delivery of the bonds of submission; the award had been bad, because it would not have been mutual; in regard that the releases would have been given after the performance of an act, which they had not had power to award that the defendant should do; and consequently it is void; and so it should never be done, and so nothing to be done on the part of the plaintiff to the defendant, but only the defendant should pay money to the plaintiff. 3. Exception. That the plaintiff does not aver, that he was ready at the place, to receive the money. *Holt*. There is no need, because the defendant ought to do the first act, and therefore if he does not come and tender the money, though the plaintiff be not there to receive it, the bond will be forfeited. 4. Exception. That the award as to the general releases is uncertain, *viz.* that they should execute mutual general releases according to the extent of the submission. *Holt* chief justice. The submission is special, of all controversies between the plaintiff and defendant as administrator, &c. so that that explains the generality of the award. Judgment for the plaintiff. *Ex relatione m^ri Jacob.*

Machin vers. Moulton. Ante 452.

Prohibition
for citing out
of the diocese.
S. C. 12 Mod.
252.

THE plaintiff declared in attachment upon the prohibition, &c. And Mr. *Broderick* argued for the defendant, that the words of the 23 *Hen. 8. cap. 9.* are general, *viz.* that a man shall not be cited out of the diocese or peculiar, where he shall be dwelling; but that restraint ought to be limited to such cases only, where the jurisdiction, within which the party dwells, hath consequence of the cause, for which the party is cited out of the diocese: for if it were otherwise, the subtraction of tithes in this case would be dispunishable. A diocese is a jurisdiction, and not the description of a place as terminated by metes and bounds. And therefore in this case the party cannot be said to be cited out of his diocese, because no remedy could be had against him there; and therefore as to that he is not within the diocese. This notion appears by the cases in 1 *Roll. Rep.* 328. *Cro. Car.* 27. 13 *Co.* 4. So if a peculiar is in two dioceses, and a man who dwells in one of the dioceses in the peculiar, is cited to the court of the peculiar held in the other diocese; that is not a citing out of the diocese, because it is within the peculiar. 1 *Roll. Rep.* 329. Therefore since in this case the tithes arose within the diocese of *York*, he is not cited out of the jurisdiction, nor consequently out of the diocese. For by the statute of 32 *Hen. 8. cap. 7.* the subtraction of tithes is made local; for by the words of the act the party offending shall and may be cited before the ecclesiastical judge of the

the place, where such wrong shall be done. In *Winch. Entr.* 570. there is a suggestion for a prohibition, for proceeding before the archbishop, where the cause was transmitted by letters of request; because by the statute 5 & 6 *Edw. 6. cap. 4.* proceeding against brawlers in churches and church-yards is limited to be before the ordinary of the place, where the offense shall be done. The case in 1 *Keb.* 481. is a case in point. And in the case of 2 *Roll. Rep.* 448. the tithes are laid to have arisen within the peculiar. There is a case in 3 *Mod.* 211. where it is held, that a taxation in another diocese is local, and will subject a man to be cited there (it is said by inference) much more will tithes subject a man, for they will make a man an inhabitant to many purposes. *Jenner* serjeant *e contra* for the plaintiff. The words of the act are express for the prohibition, and suit for tithes is mentioned in the preamble. And there is an opinion in point 2 *Brownl.* 28. confirming the generality of the words of the act; and there is no authority against it. There is also a case of a legacy in 2 *Brownl.* 12. and for words 191. [But of personal things there is no doubt.] It is a rule in the canon law, that *forum sequitur reum*. And the cases in 1 *Roll. Rep.* 328. and 1 *Cro.* 97. are strong cases for the plaintiff.

The court awarded a consultation; because by the statute of 32 *Hen. 8. cap. 7. sect. 2.* the suit for with-holding of tithes in express words is appointed to be before the ordinary of the place where the wrong was done. But if it had been in another case, it had been within the 23 *Hen. 8. cap. 9.* and the prohibition should have continued.

Episcopus Salisbury *vers.* Philips.

ERROR upon a judgment in *quare impedit* after verdict for the plaintiff. S. C. 1 Salk. 43. Carth. 505. S. C. 12 Mod. 321.

The plaintiff declares, that *A.* and *B.* were jointenants of the advowson of the church in gross; and being jointly seised, by indenture between them agreed, that they should stand seised of that advowson in common, and present severally by turns; and lays several presentations by each of them; and the plaintiff claims as executor to his father, the assignee of one of the said parties, for a disturbance in the time of the father. The bishop pleaded, that it came to him by lapse. The plaintiff replies, and shews that he presented *Sims* within six months, and the bishop refused him. The bishop rejoins, and confesses the presentation, and that the clerk came to him, and that he gave him time to prepare for his examination for three days, and that the clerk went away, and never

Di. 29. pl. 194. Watf. Comp. Incumb. 8vo. 117. cap. 8.

ver returned. And issue upon the rejoinder, and verdict and judgment for the plaintiff in the Common Pleas. Mr. Cartbrow for the plaintiff in error, assigned a variance between the original and the declaration. The original was, *praesentare ad ecclesiam de Staunton*, and the declaration was, *Staunton alias Staunton-Fitzberbert*. But *per Holt*, one name is enough, and therefore *non allocatur*. The writ was to present to the church of Staunton, and the count was, to Staunton alias Staunton-Fitzberbert.

2. Exception. It appears, that the plaintiff has not any title. For, 1. This indenture *nil operatur*, but is only good by way of covenant; for if it was in case of lands, it would not amount to a partition; for nothing can do that, but what divides the title, and makes several rights to several parts, which cannot be in this case of one intire thing. And if it be admitted, that this agreement would make them tenants in common; it would nevertheless be ill, for they could not present singly; and if they do, the clerk may be refused. Nor could the one of them grant the whole, which each of them ought to have, if this should amount to a division, for they cannot have part of an intire thing; and so two advowsons should be made of one. And there is no case in all the books of the law, which warrants it. *Holt* chief justice, doubtless they may make partition, to present by turns, and that will divide the inheritance *aliquatenus*, and create separate rights, so that the one shall present in the one turn, and the other in the other, which is a sufficient partition; for partition of the profits is a partition of the thing, where the thing and the profits are the same. Indeed it cannot make two advowsons out of one, but it can create distinct rights to present in the several turns. But if this should not make a good partition, the question is, if one of them presents, and the bishop does not refuse his clerk for that reason, but refuses him obstinately without any cause, and a *quare impedit* is brought, and admitted to be good; whether the grantee shall not recover his presentation. The chief justice thought this to be a very plain case. But at another day, because Mr. Cartbrow was so positive in the matter, that there were no authorities in the books which warrant this case; he said, that by *Westm. 2. cap. 5.* if divers persons, claiming an advowson, make composition upon record, to present by turns, and this composition is executed by presentation by one of the parties, the other may have a *scire facias* upon this agreement, being upon record, and he is not put to his *quare impedit*; and that not only in a case of a disturbance by one who was party to the agreement, but by a stranger. And that statute does not extend only to privies in blood, but also as 2 *Inst.* 362. says, to strangers also, which must be of tenants in common. In 28 *Hen. 8. Dier* 29. pl. 194. if tenants in common of an advowson make composition to present by turns, and that is executed of all parties, in a *quare impedit* brought by any of them they have no need to make mention of the composition; which shews, that by the

Partition by covenant to stand seised, to present to the advowson by turns.

composition the inheritance and right is severed, and a separate interest vests in each of them, to present alternately. The only difference is, that in case of coparceners, they being privies in blood, the partition may be by parol; but between tenants in common it must be by deed. *Fitzb. nat. br. 62. d. f. 11 Hen. 4. 3. b.* And in *Co. Entr. 496. b.* grantee of a next avoidance, by a man who was so to present by turns, declares in *quare impedit* positively upon his grant, that he was *possessionatus de advocacione ecclesiae praedictae pro prima et proxima vacatione ejusdem.* And in *Fitzb. nat. br. 62. a.* there is a stronger case, where a manor with an advowson appendant descended to two coparceners, and they made partition of the demesnes, and to present severally by turns to the church; this was a good partition, and the advowson was appendant at one turn to one part of the demesnes, and at the other to the other.

Mr. *Carthew* cited a case in *2 Mod. 97.* to the contrary. To which *Holt* chief justice *in ira* said, that no books ought to be cited at the bar, but those which were licenced by the judges. Judgment was affirmed. *Ex relatione m'ri Jacob.*

Rex *vers.* Higginson.

AN information was preferred against the defendant for main- Cases B. R. 322.
tenance *contra formam statut.* The maintenance was laid in Variance between the information and mittimus.
Chester. And upon not guilty pleaded, the record was sent to be tried in *Chester* by *mittimus*; and the *mittimus* was, in information for maintenance *contra formam statuti facti contra manutene- ntes et embraceatores necnon illegitimas emptiones titulorum.* And the defendant upon the trial was found guilty. Mr. *Northey* moved in arrest of judgment, that the judge who tried the cause, had not any authority; for the information is general, *contra formam statut.* and the *mittimus* is confined to an information upon *32 Hen. 8. cap. 9.* these words in the *mittimus* being the very words in the title of the act of *Henry VIII.* and so he had not authority to try any information upon all the laws against maintenance in general. And for this exception the verdict was set aside. For *per Holt* chief justice, though an action will lie upon this statute, as appears *3 Cro. 735. Rast. Entr. 430.* yet the question is, if where there are several statutes, which inflict several distinct penalties upon maintainers of suits, &c. and an information for maintenance concludes generally, as in the present case, it is not a good description of such information, that it is an information against one of the said statutes in particular. For this information is not only against the statute of *32 Hen. 8. cap. 9.* but also against *Artic. super chart. cap. 11.*

and 1 Ric. 2. cap. 4. and all the other statutes. And therefore the information being general upon any other statute, the *mitimus* is not good, which restrains it to the statute of Henry VIII. only; but it is a variance from the record, with which it ought to agree. And therefore it ought to be tried again. *Ex relatione m'ri Jacob.*

Starke *vers.* Cheeseman.

S. C. 1 Salk.
128.
Carth. 509.
Drawing a
bill of ex-
change is an
actual pro-
mise.
1 Vent. 152,
153.
1 Lev. 280.
1 Vent. 27,
44.
1 Mod. 14.
Cro. Jac. 44
Comb. 32.
Vide Hard.
486.
Hob. 180.
2 Keb. 695.
Winch 24.
1 Cro. 302.

IN an action upon the case upon a bill of exchange the plaintiff in his declaration declared upon a bill of exchange, and that he offered it to the person upon whom it was drawn, and he refused to pay it, *per quod* the first drawer *devenit onerabilis per consuetudinem, &c.* and there was an *indebitatus assumpsit*, and a *quantum meruit*, in the declaration. Judgment by default, and a writ of inquiry of damages, and intire damages given. And now it was moved in arrest of judgment, that as the matter stood upon the first count, this action was founded upon a deceit, the bill not being paid according to the warranty, every one who draws a bill, warranting the payment of it; and therefore being in the nature of an action for a deceit, which is a *tort*, it cannot be joined with an *assumpsit* which is founded upon a contract; and therefore for want of laying an expresse promise it was ill, intire damages being given. *Northey* said, that the action was founded upon the custom, and that the obligation arose by that, and therefore the action is maintainable without shewing a promise. *Cro. Car. 302.* A declaration upon a bill of exchange without shewing any promise, and the roll is so. 2. This sounds all in contract, for the custom raises a promise in law, that the drawer will pay the money, if the person, upon whom it was drawn, refuses to pay it. And 2 *Cro. 307.* says, that if a merchant accepts a bill, it has by the custom the force of a promise, to compel him to pay the money. *Holt* chief justice at the beginning seemed to agree with the objection, and said, that he who draws the bill warrants the payment of it, and if he does not, it is a deceit, and one may have an action upon it; but then they ought not to join it with an action upon a promise. That is the reason of the case of Sir *John Dalston* and *Janson*, *Mich. 7 Will. 3. B. R. Ante, 58.* In the time of 2 *Cro.* they were not arrived at this way of declaring upon bills of exchange. *Gould* justice cited 1 *Sid. 306.* that if a man brings *assumpsit* for the arrears of an account, where the action formed is debt; he ought to lay an expresse promise, to maintain the action. *Holt* said, that the notion of promises in law was a metaphysical notion, for the law makes no promise, but where there is a promise of the party. Afterwards in this term judgment was given for

for the plaintiff, because the drawing of the bill was an actual promise. *Ex relatione m'ri Jacob.*

Episcopus St. David *vers.* Lucy. Ante, 447.

Pending the suit against the bishop of *St. Davids* before the archbishop, he appealed to the delegates; and pending his appeal, he moved in *B. R. Pasch.* eleventh of this King, for a prohibition to be directed to the delegates upon divers suggestions, which prohibition was denied. [See before, 451.] After which the commissioners delegates over-ruled his appeal, and the archbishop pronounced sentence of deprivation against him; from which sentence he appealed to the commissioners delegates; and seeing that they were of opinion to affirm the sentence, he moved by his counsel for a prohibition now to be granted by this court to the commissioners delegates, to stay their proceedings in the appeal from the sentence of the archbishop; upon a suggestion, 1. That by the canon law the archbishop alone could not deprive a bishop. And, 2. That the delegates refused to admit his allegations, and the counsel for the prohibition argued, that the archbishop had not any authority over his suffragan bishops; that the bishops are lords of parliament, and so peers to the archbishop, and therefore he could not have authority over them, *quia par in parem non agit*; that there are no instances of such proceedings, nor hath this point been determined in our books; and therefore being a matter of great consequence, it ought to be settled by mature deliberation. That the deprivations of bishops, which have been heretofore, have been by the ecclesiastical commission, or in convocation, or by act of parliament; and therefore by *Littleton's* rule, if such a thing might have been done, it should be intended, that it would have been put in practice before this time. That though the archbishop may visit and censure the bishops; yet it does not follow, that he can deprive; because deprivation does not follow the visitatorial power as a necessary consequence. That the law has provided for the temporalities, as 14 *Edw. 3. cap. 3.* that their temporalities shall not be seized into the King's hands but upon lawful cause, and judgment thereupon given according to the law of the land; and 25 *Edw. 3. cap. 6.* that their temporalities shall not be seized for a contempt; and that in the case of the archbishop of *York* and the bishop of *Durham*, in *Ryley's placita parliamentaria* 135. there is a distinction made between their temporal state and their ecclesiastical; and the archbishops have no authority over them as to their temporal state; and therefore since this sentence of deprivation takes away their temporalities from them, over which they have no jurisdiction, the King's Bench will grant a prohibition, to examine in-

An archbishop may deprive a suffragan bishop. Shaw Par. Law, cap. 10. s. 10.

Deprivations of bishops.

to

A bishop lord
of parliament
in respect of
the temporal-
ties.

to the jurisdiction of the archbishop, to the end that if he has not such jurisdiction, the bishop may not be deprived of his temporalities. Another objection was made, that the same commissioners, who were in the commission of delegates upon the appeal *propter gravamen*, were commissioners in the commission upon the appeal to the merits, where the whole matter, as well the *gravamen* as the rest of the cause, might be urged, and so they would be judges in the same cause, which they had determined against the bishop upon the former appeal, which was unreasonable. *E contra*, it was argued by the Attorney General and the other counsel for the promoter against the prohibition. That the suggestion for the prohibition was founded only upon the canon law, and not upon the common law or any act of parliament; and therefore very proper before the delegates upon the appeal, but not any ground for a prohibition. And as to the objection, that the bishop is a lord of parliament, that is only in respect that he holds his temporalities by barony, which temporalities are annexed to his bishoprick, and therefore being deprived of the bishoprick, he will in consequence be deprived of the temporalities, and of his seat in parliament. There is not any other jurisdiction for such purpose, for the convocation is more properly a legislative than an executive authority. If the archbishop has no such authority, what is the meaning of the exception in 23 *Hen. 8. cap. 9.* that bishops may be cited out of their diocese? The act as to clergymen in general was reasonable, because there is a jurisdiction within the diocese, to which they are subject; but the exception was of necessity in case of bishops, because they were not subject to any other jurisdiction than that of the archbishop. Before the statute of 17 *Car. 1. cap. 11.* which took away the High Commission Court, which statute is since confirmed by 13 *Car. 2. cap. 12.* they proceeded before the commissioners appointed by virtue of the power given to the queen by 1 *Eliz. cap. 1.* and the bishops were deprived by them, because it was a more expeditious way of proceeding; but now by the said acts the old jurisdiction is restored, as it was upon 26 *Hen. 8. cap. 1.* Also upon 29 *Car. 2. cap. 9.* which takes away the writ *de haeretico comburendo*, there is a saving for the jurisdiction of archbishops and bishops, &c.

Wright King's serjeant of the same side urged, that a power of deprivation was incident to the visitatorial power, and the case in *Riley* 186. Admitting the power of the archbishop in spiritual cases, it must follow of consequence, that he has a power of deprivation; because deprivation is the punishment proper for some cases.

This

This matter was moved several times at the bar. And the whole court was of opinion, that the prohibition should not be granted. And as to the authority of the archbishop, *Holt* chief justice said, that there are archbishops, who have authority over their suffragan bishops; and there are primates, who are superior to them. The archbishop of *Spalata* says in his book, that an archbishop has the same authority over his suffragan bishops, that the bishop has over his inferior clergy; and though there may be a co-ordination *jure divino*, yet there is a subordination *jure ecclesiastico qua humano*; not of necessity from the nature of their offices, but for convenience. And for what other purpose have archbishops been instituted by ecclesiastical constitutions? The power of an archbishop was very great here in *England* anciently; the same jurisdiction of supremacy as the patriarchs of *Constantinople*, &c. The pope used to call him, *alterius orbis papam*, and he exercised the same jurisdiction with him. *Theodore*, who was archbishop soon after the first constitution, not more than the fourth, fifth, or sixth, of *St. Austin*, deprived *Winifred* bishop of *York*, for the said fee was not then metropolitane, but subject to the archbishop of *Canterbury*; and yet at the same time there was a council held; and *Beda* commends *Theodore* for it. But afterwards in the time of *Henry I.* and King *Stephen*, the pope usurped the authority of the archbishops; in exchange for which they became *legati nati* of the pope. See for this *Roger Twisden de schismate*; and that is the reason why this practice cannot be found to have been put in use for so long time; for when the archbishop had divested himself of his supremacy, and the pope had gained all his jurisdiction, the bishops being created by the pope, and consequently having better interest at *Rome*, at least as good as the archbishop, it was in vain to intermeddle. And if there are any instances found, of bishops who were deprived in the said time, it was where the archbishop had more interest with his holiness, and so the bishop perceiving it acquiesced. But at this day by the act of *Henry 8.* this jurisdiction is restored. It was always admitted, that the archbishop had metropolitane jurisdiction, and the bishops swear canonical obedience to him; and where there is a visitatorial power, there is no reason to question the power of deprivation; for the same superiority, which gives him power to pass ecclesiastical censures upon the bishops, will give him power to deprive, it being only a different degree of punishment for a different degree of offense. This appears upon the statutes 26 *Hen. 8. cap. 1.* and 1 *Eliz. cap. 1.* where notwithstanding that there is not one word of deprivation, but only to visit, repress, redress, reform, correct, and amend; yet they have been construed to give a power of deprivation. And by virtue of the 26 *Hen. 8. cap. 1.* *Bonner* was deprived. Dr. *Burnett* the bishop of

of *Salisbury* in his book of the reformation believes that *Bonner* was deprived because he had accepted letters patent of *Henry 8.* to be bishop; but that cannot be a legal reason, for he being bishop before for his life, acceptance of a patent *durante beneplacito* could not determine it. So the high commissioners, by virtue of the act of 1 *Eliz. cap. 1.* deprived; and yet there is not one word of deprivation in the said act, but only visit, &c. as in the said act of 26 *Hen. 8.* And the reason, that it is an inherent prerogative in the King, is but an additional reason; for it is plain, that before the statute of *Elizabeth* the King could not have granted a commission for redressing and reforming ecclesiastical matters, and therefore the power that they had proceeded from the said act; for the King exercises his ecclesiastical supremacy by his ecclesiastical judges, as he exercises his temporal by his temporal judges. And he said, that he did not know any subordinate visitatorial power in any case but that of an archdeacon, which is a subordinate jurisdiction, and for informing the bishop, and he is called *oculos episcopi*. But where there is an unlimited power of visitation, there must be of consequence a power of deprivation. This jurisdiction of the archbishop has notice taken of it in acts of parliament. Because that the act of 16 *Car. 1. cap. 11.* which took away the high commission court, was thought to have lessened the jurisdiction of archbishops and bishops; therefore it was repealed *quoad*, by 13 *Car. 2. cap. 12.* And the act of 29 *Car. 2. cap. 9.* which takes away the writ *de haeretico comburendo*, has a saving of the jurisdiction of the protestant archbishops and bishops. If issue was joined (as his brother *Gould* justice well observed) in a real action upon the deprivation of a bishop, to whom could the court write, unless to the archbishop? In case of deprivation of a parson, the court writes to the bishop to certify. Then if the archbishop had such authority, as it is plain he had; by what law is he restrained? Mention is made of an old canon of *Antioch*, but that was never received in *England*. And if the non-usage should be an argument against it, which proceeded from a particular reason, as appears before; it would also be a reason why bishops should never be deprived at all, because no bishop was ever deprived from the time of *Henry 2.* until *Henry 8.* and no other jurisdiction can be shewn, to which they are subject: for all the same objections may be made to the power of the convocation; for a convocation has no power over a peer *qua* peer; but the objection will not prevail, for their peerage is but accessory, and they have their temporalities as they are bishops. And in ancient times there were abbots, who were lords of parliament, and yet their visitors had power to deprive them. So that if any ecclesiastical jurisdiction is allowed to be over them, this objection will fail. And in fact it signifies nothing, because their peerage is but grafted upon their being bishops,

shops. And the notion of the deprivation of bishops by the convocation is new, and started by Sir *Bartholomew Shower*, and (by him) the convocation has not any such power; and if there was such power in the convocation, it is presumable that care would have been taken in the act of *Henry 8.* that there should be an appeal from them. Farther, it seems by the writ *de haeretico comburendo*, *Fitz. nat. br.* 269. that what is done in convocation, is the act of the archbishop, and only the consent of the rest of the clergy in convocation. He agreed, that the spiritual court has not any jurisdiction in case of freehold; but in this case the freehold follows the person, being under such capacity. He agreed also, that the spiritual court cannot examine institution after the induction, see *Hob.* 15. because that makes a plenarty; and therefore the declaring of institution to be void, would be avoiding a temporal act. But these instances are not like the present case. The reason of the case in *Ryley* was plainly, because the archbishop punished him for matter in which the bishop of *Durham* acted in his temporal capacity as count palatine of *Durham*; which appears by the questions asked, whether the gaol was the gaol of the county palatine, and whether it had not always been delivered by lay people? And (by him) to question this authority of the archbishop, is to question the very foundations of the government. And *Gould* justice said, that in 2 *Hen.* 4. 10. *a.* where the ecclesiastical jurisdictions are enumerated, the account begins with archbishops. And it appears by our books, that bishops may be deprived for dilapidations, 11 *Co.* 49. *b.* 3 *Inst.* 204. 29 *Edw.* 3. 16. *a.* 2 *Hen.* 4. 3. *b.* And such deprivation seems to be by the archbishop; for otherwise to whom should the court write? For which reason it must be pleaded by whom it was done, as *Bro. deposition*, 5. The court cannot write to the convocation; and it is strange, if the bishops are deprivable, that the law should place it at such a distance, as to refer it to the convocation. And in 1 *Roll. Abr.* 882. *Anselmus* archbishop of *Canterbury* is said to have deprived several prelates. And there is no case, where a person hath power of visitation, but he hath also power of deprivation. *Fitz. nat. br. tit. prohibition.* But when there was such a summary way of proceeding before the high commission, it is no wonder if such a tedious proceeding before the archbishop was not used. But *Holt* chief justice said, that though he was fully satisfied in his opinion that the archbishop had such jurisdiction, yet he would not make that the ground of denying a prohibition in this case. The matter of the suggestion is, that the archbishop is restrained by the canon law from proceeding, &c. without assistance, &c. Now it must be, that the court take notice that the archbishop by the common law hath metropolitical jurisdiction, and for that purpose he was constituted; that there are two in *England*, who are primates

mates in their respective provinces; and then they have sufficient jurisdiction, and being the judges, but perhaps by the canon law they ought to take other persons to their assistance, yet their proceeding without such assistance cannot be a ground for a prohibition. If in fact the archbishop extended his jurisdiction farther than he could by the rules of the common law, that might be a ground for a prohibition; but where all the authority that he makes use of is no more than what the common law allows him, but there are some ecclesiastical canons, which restrain him from exercising the jurisdiction which he hath by the common law; that is matter proper for the conusance of the delegates upon the appeal, but no ground to prohibit them from proceeding. And it is without precedent, to grant a prohibition to the ecclesiastical court, because they proceed there contrary to the canons. And Gould justice said, that if a tortious judgment be given, that is proper matter for appeal, and not for prohibition. And of that opinion lord *Hobart* is expressly. And as to the objection concerning the commissioners of the commission of delegates, *Holt* chief justice said, that they upon a second appeal could not determine the *gravamen* at another time. And if the said objection should be allowed, where their course is, upon allowing the *gravamen*, to retain the cause, there the archbishop might make the same objection, that they were not proper persons to be judges for the bishop, because they had determined the *gravamen* against the archbishop, and so they should not proceed at all, it being but the reverse of the said objection. And he was of opinion, that being appointed judges by a new commission, it was well enough. And the prohibition was denied by the whole court. And *Holt* chief justice ordered the counsel for the bishop to enter their suggestion upon record, and they would enter the reasons of the denial of the prohibition. And *Holt* said, that if the other party had insisted upon it, they could not have moved for a prohibition before their suggestion was entered upon the roll. Then Mr. *Mountague* on behalf of the bishop moved the court, that they would grant a *mandamus* to the commissioners delegates, to admit the bishop's allegations. And he compared it to the cases where they grant *mandamus's*, to compel the granting of probates of wills, and letters of administration. But *per Holt* chief justice, the King's Bench cannot grant a *mandamus* to them, to compel them to proceed according to their law. Indeed *mandamus's* are grantable to compel probate of wills, because it concerns temporal right; and to compel the grant of letters of administration, because the statute directs to whom they shall be granted. But in the present case a *mandamus* was denied. *Ex relatione m'ri Jacob.*

Motion for a *mandamus* to admit the allegations of the bishop.

Note, that after this denial of the prohibition, the bishop of *St. David's* petitioned the lord chancellor *Somers*, to have a writ of error upon this denial of the prohibition. Who having some doubt, whether it would lie or not, referred it to the attorney general; who certified his opinion, to be, that a writ of error would lie in this case. Upon which the suggestion was entered upon record, and the denial of the prohibition; and the writ of error was granted, and the whole record brought by the chief justice into parliament. And afterwards upon hearing of his opinion, the lords of parliament were of opinion, that a writ of error would not lie in this case. Note, that *Holt* chief justice told me, that if the lords had been of opinion, that the prohibition ought to have been granted, he never would have granted it.

Rex vers. Chandler.

Chandler was brought into court upon a *habeas corpus*, to which the warrant of his commitment was returned. And upon two exceptions taken to his commitment, he was discharged. The first was, that it did not appear sufficiently, that the defendant had not sufficient distress (he being committed upon a conviction upon the new act of deer-stealing) and therefore it was ill; for if he had sufficient distress, the justices of peace had not any power to commit him to prison; but the warrant of commitment only recited, that *Chandler* of the parish of *Hadley* in the county of *Middlesex* was convicted, &c. and because that he did not pay the forfeiture, the justice issued his warrant, directed to all constables, &c. to require them, to levy the forfeiture by distress, &c. and that the constable of *South Mims* in the said county had made return, that the defendant had no goods in *Hadley*, these are therefore, &c. And *per Holt* and *Gould* justice, the act of parliament is not pursued, for the return of the constable is nothing to the purpose. Indeed a warrant is appointed by the statute to be issued and returned; but the statute does not say, that upon the return to the warrant, that he has not sufficient distress, he shall suffer imprisonment, &c. but that for want of distress he shall suffer imprisonment, &c. And therefore if there is no distress, nor the pecuniary penalty paid, the remedy for that ceases, and the offender ought to suffer another punishment, and judgment ought to be given for that, and there ought to be more than a bare commitment. If the party was present, as in this case, upon the conviction, the justice ought to adjudge that he should pay the money as the act appoints, and then he ought to detain him for two

Error upon
denial of a
prohibition.

S. C. Carth.
501, 508.

1 Salk. 378.

5 Mod. 446.

3 Danv. Ab.

305. pl. 6.

A man convicted

upon the new

statute of deer-

stealing can-

not be com-

mitted, if he

hath sufficient

distress.

3 & 4 Will.

& Mar. cap.

10.

See now stat.

5 Geo. 1.

c. 15. & 28.

and stat.

9 Geo. 1.

c. 22.

Post. 581,

583.

Constable of
South Mims
cannot return
want of goods
to be distrain-
ed in *Hadley*.
Warrant exe-
cuted by a
constable.

Execution up-
on an errone-
ous judgment
is good, until
the judgment
be reversed.

days, to discover if he hath sufficient distress, and if it appears, that he hath not, then he ought to record it, and give judgment that he shall suffer imprisonment, and commit him presently. But if the party was not present, then he ought to proceed in this manner. First he ought to issue his warrant for levying the money by distress, and if it appear to him by the return of the warrant, that there is not sufficient distress, then he ought to record that he hath no distress, and therefore award that he shall be committed, &c. and upon that issue his warrant. But a man ought not to continue in prison upon a bare recital in a warrant without any adjudication. There ought to be a judicial determination where such infamous punishment is to be inflicted. It is said in 8 Co. 120. a. Dr. Bonham's case, that there ought to be a record made of it. But *Turton* justice was of opinion, that the issuing of the warrant in this case was well enough, and so the commitment good upon the return of no distress. 2. The second exception was, that the constable of *South Mims* could not return a matter of fact done in *Hadley*, because it was out of his jurisdiction. And the whole court was of that opinion. For *per Holt* chief justice, if a statute directs a thing to be done by a constable, that will give them jurisdiction over the limits of their parishes. So if a justice of peace directs his warrant to a particular constable, he may execute it out of his parish. But where a warrant is directed generally, to all constables, &c. it shall be taken respectively, to each of them within their several districts; and not to the constable of one parish, to take a distress in another parish. For where a precept or warrant is directed to men by the name of their office, it is confined to the districts in which they are officers. And therefore the constable of *South Mims* could not return this fact in *Hadley*. To all which *Gould* justice agreed; and he said, that the return of the warrant by the constable of the parish where he lived might have been sufficient satisfaction to the justice of peace, to ground his adjudication upon it. Mr. *Northey* started an objection, that the conviction ought to be quashed, before the defendant could be discharged; for though in a writ of execution the judgment is shewn (which has no need to be shewn there) and errors appear in it, yet the execution is good, until the judgment be reversed. So though errors appear in this conviction, &c. And also the court will not take notice of the conviction, because it need not be shewn. But *Holt* chief justice said, he doubted of that. For in *Busbell's* case in *Vaughan*, the jury were fined, because they gave a verdict against evidence, and were committed in execution for it in court, which was a judgment; and yet they were discharged in the Common Pleas, though the record of the conviction was not before them. He said, he always believed it a strong objection. But they agreed clearly in *Busbell's* case, that if it had been a conviction upon a verdict;

verdict, they could not have discharged *Bustell* out of execution, until the judgment had been reversed by error. But this point was not afterwards moved. *Ex relatione m^{ri} Jacob.*

Villers *vers.* Parry and Moor. Error C. B.

Intr. Hil. 10 & 11 Will. 3. B. R. Rot. 179.

THE plaintiff sued a *scire facias* against *Parry* and *Moor* s. C. Comb. bail of Sir *Talbot Clerk*, upon a recognisance in which they ^{397.} bound themselves in the sum severally of 2000*l.* and the writ ^{Ante 182.} was to shew cause, why the sum of 2000*l.* should not be levied upon each of them. The defendants plead, that no *capias* issued against the principal. To which the plaintiff replied, and shewed a *capias*. And upon demurrer judgment in the Common Pleas was given for the plaintiff. The demurrer was, that the plaintiff ought not to have execution of the two several sums of 2000*l.* and 2000*l.* against the defendants. The joinder in demurrer was, that he ought to have execution of the several sums of 2000*l.* and 2000*l.* And the judgment was entred, that the plaintiff should have execution against both defendants of the several sums of 2000*l.* and 2000*l.* Upon which judgment error was brought, and assigned, that the court hath given an erroneous judgment in this, that they have given a joint judgment of 4000*l.* against each of the defendants, where it ought to have been but for 2000*l.* against each of them. Against which it was argued by Mr. *Brederrick* for the defendant in error, that the whole depended upon the interpretation of the *separalibus summis* contained in the bar. And (by him) there are several words, which do not import any determinate sense, but ought to be interpreted according to the company in which they are. Of this sort is the word *separalia*, and it signifies respective. And if the judgment had been, that he should recover the respective sums of 2000*l.* and 2000*l.* it had been good. It appears that each acknowledged but 2000*l.* and that they should be levied against them severally. And therefore though the judgment be joint in the words, yet the subject matter requiring it, several interpretations shall be made; and the prayer is confined to the *secundum formam recognitionis*. *Palm.* 435. *Latch* 137. 2 *Hen.* 4. 13. Where in a *scire facias* against several terretenants the sheriff returned, that he warned them *secundum formam brevis*; and it was adjudged, that it should be taken respectively, because the return was *secundam formam brevis*. So here the prayer is *secundum formam recognitionis*. He cited also 1 *Sid.* 339. *Gee v. Fane & ux.* *Yelv.* 53. 1 *Saund.* 65. *Pasch.* 34 *Car.*

34 Car. 2. B. R. Rep. 386. Mich. 3 Will. 3. Mar. 2. B. R. Rep. 357. or 357. *Rofy v. Hunt.* And (by him) where there is error in the bare entry of the judgment, the court will reverse the judgment of the Common Pleas, and give such judgment as they ought to have given.

But the whole court were of opinion, that this was error. But *Holt* chief justice said, that it was a question, if it might not be amended in the Common Pleas. To which it was answered by Mr. *Northey* council for the plaintiff in error, that such a motion had been made in the Common Pleas, and denied. [See it before 182.] But *Holt* seemed to be of opinion, that it might well be amended, the writ being good, and therefore this fault in the judgment but *vitium clerici*. But if the writ had been ill, it could not have been amended, because the party might have had a new writ. Upon which it is adjourned, to the intent that application might be made to the Common Pleas for an amendment. And it being moved there, the court was divided, two judges against two. And so the case was not moved afterwards in the King's Bench.

Rex *vers.* Pheasant.

Want of *ad-tunc et ibidem jurat.*

ERROR brought to reverse a judgment of attainder upon an indictment for a rape. Several errors were assigned by Mr. *Peere Williams*, and over-ruled. Among others one was, that it is not said in the caption, *adtunc et ibidem jurat.* and it may be, that they were sworn at an alehouse, and not for the said purpose, &c. And for this he cited 1 *Ventr.* 16. 2 *Keb.* 610. 1 *Mod.* 26. 2 *Keb.* 583. But the court inclined to disallow the exception, because it would reverse an infinite number of attainders and judgments upon indictments. And *Holt* chief justice said, that in *Coventry*, *Lincoln*, &c. the grand jury were sworn at the sessions, from whence they came to the assizes, and they insisted, that they were not accustomed to be sworn there again; but he held it to be an ill practice, and always for his part caused them to be sworn again at the assizes. And this exception being moved, the court refused to allow it.

The inhabitants of the parish of Clerkenwell against a.c. Curth.
Bridewell.

A. Who had been educated in *Bridewell* as apprentice of one of the masters of the said hospital in the trade of hemp-dressing, came to the parish of *Clerkenwell*, and there being likely to become chargeable, &c. was removed by two justices to *Bridewell*, which is an extraparochial place. But *per Holt* chief justice, the justices of peace have no authority, to settle any person in an extraparochial place; for the statute which gives them authority, extends only to the poor within parishes. Parishes in reputation are within the act, but places extraparochial are out of the act. And the order of the justices was quashed.

415.
Stat. 486,
487, 501.
3 Lev. 142,
143.
4 Mod. 157,
158.
1 Mod. 251;
2 Mod. 237.
Justices of
peace have no
authority to
remove poor
persons into
places extra-
parochial.

Easter Term

12 Will. 3. B. R. 1700.

Sir John Holt Chief Justice.

Sir John Turton

Sir Henry Gould

} Justices.

Cremer *vers.* Wickett. Ante 509.

S. C. Carth.

517.

Nul tiel record
replied.

See Ante 274.

Judgment by
default is final.

IN an action for assault, battery, and wounding, the defendant pleaded another action depending in this court in abatement. The plaintiff replied, *nul tiel record*. And entry was made, *quia curia domini regis hic se advisare vult super inspectione et examinatione recordi, &c. dies datus est, &c.* And the defendant put a demurrer into the office, and refused to pay for the entry of his plea; for which reason the plaintiff signed final judgment. So that the question in court was, whether the demurrer was regular. For if it was regular, then he ought not to pay for it, till the paper book was complete; but if otherwise, then he ought to pay for it before, and for want of that the plea was no plea, and so judgment ought to be by default, which is final judgment. And *per Holt* chief justice, where it is a record in the same court, it is the most proper and sure method; if it was a record in another court, then there ought to be a rejoinder, *quod habetur tale recordum, &c.* And if in this case upon search it appears to the court, that there is such record; then the entry ought to be, *quia inspectis recordis, &c. apparet*, that there is such record, *ideo, &c.* But if no such record be found, then, *quia inspectis, &c. non invenitur aliquod tale recordum, &c.* then judgment *quod respondeat ulterius* ought to be given, for failure of the record; and there is no need to join issue, where it is a record of the same court. The other method has been used, *viz.* to rejoin, *quod habetur tale recordum*; but that is contrary to the reason of the law, for where it

is

is a record of the same court, the entry ought to be made as here. *Dier* 228. a. Or otherwise the plaintiff might have prayed *oyer* of the record. Then this entry being regular, the demurrer was irregular. But then final judgment ought not to be signed, but only *quod respondant ulterius*; for failure of record is not peremptory. But Mr. Northey for the plaintiff urged, that they might sign final judgment by *nil dicit* for want of paying for the plea. But *per Holt* chief justice, that is too hard, where there was a probable question, as there was in this case. And therefore the judgment was set aside, and the plea stood as of the last term, and day was given to inspect the record as of this term. *Ex relatione m'ri Jacob.*

*Respondens con-
fer upon failure
of record.*

Ashmead *vers.* Ranger.

Intr. Trin. 11 Will. 3. B. R. Rot. 754. *Comyns* 638. S. C. Salk.
has it Rot. 752. S. C. Comyns 71. S. C. 12 Mod. 379.

THE plaintiff brought an action of trespass against the defendant for the breaking of his close at B. and the cutting and carrying away of oaks and ashes, &c. The defendant pleaded; that the place where, &c. is a close called *Horn close* containing eight acres; and that it is, and at the time of the trespass was, the freehold of the defendant; and that the oaks and ashes were timber trees there growing; and therefore he cut them down and carried them away, as well and lawfully he might, &c. The plaintiff replies, that the place where, &c. is parcel of a messuage and twenty acres of land, which are copyhold, and parcel of the manor of, &c. whereof the defendant is seised in fee; and that he granted them to J. S. for his life, to hold at the will of the defendant according to the custom of the manor; and that there is a custom within the manor, that every copyholder for life, &c. hath used, to have all timber trees *super eisdem terris customariis suis crescentes*, for the reparation of their houses, &c. and that all the timber trees at the time of the trespass aforesaid, and until this time, growing upon the said lands, were not sufficient for the reparations, &c. The defendant demurred. And Hilary term last Mr. Northey for the defendant took exception to the replication, because it is not, *alias quam in barra*, which ought to have been said, since the plaintiff varies from the place in the defendant's plea. But *Holt* chief justice held, that was well enough, it being very well consistent, for the place where, &c. may be a close called *Horn close* containing eight acres, and yet it may be parcel of a copyhold tenement and twenty acres. Then Mr. Earle took exception to the defendant's plea, because he had not given colour to the plaintiff. But *per Holt* chief justice, if the plaintiff replies, the defect of

13 Rep. 68.
11 Mod. 18.
Copyholder
by custom shall
have timber
trees to repair
his house, and
shall maintain
trespass against
the lord if he
cuts them.

New assign-
ment.

Defence of colour aided by replication, not by general demurrer.

of colour is waived, but upon a general demurrer advantage might have been taken of it. And now this term Mr. Northey argued for the defendant, 1. That the lord of the manor might take the trees growing upon the copyhold, if he leaves enough for reparations. *Godb. 173. per Coke* chief justice. And the constant practice is accordingly through all the West of England, where the lord may assign to the copyholder enough for repairs upon other land; and therefore it is not material, though he did not leave enough upon the copyhold land. 2. The plaintiff cannot have an action of trespass, but an action upon the case. As if a man has right to estovers in a wood, and the owner cuts all the wood; he shall have case and not trespass. *Moor 546. pl. 727. 3 Cro. 629. 1 Roll. Rep. 196. Mr. Earle e contra* argued for the plaintiff, that the copyholder might have trespass against the lord himself. *2 Hen. 4. 12. 2 Saund. 422. Noy 14. Cross v. Abbot.* And as to the other point, that the lord could not cut the trees, without leaving enough, he relied upon *13 Co. 67. 2 Brownl. 328. in point, Heydon v. Smith.*

Lessor cannot enter and cut trees, unless they are excepted by the demise.

And the whole court were clear of opinion, that judgment ought to be given for the plaintiff; because it appears, that the plaintiff had not enough to repair without these trees. And therefore judgment could not be given for the defendant, without overthrowing the case of *Heydon v. Smith.* And *per Holt* chief justice, a copyholder holds the trees by copy of court-roll, as well as the land; and therefore it seemed to him, that the lord could not cut the trees growing upon the copyhold. And *3 Cro. 361.* says, that the copyholder may lop the trees without special custom; which shews, that the copyholder has a special property in them. And there are some places, where the lord compounds with the copyholder for his special interest; and the copyholder shall have the acorns; and if birds build their nests, and breed there, he shall have the young ones. And it is not like the case of a lease of the land excepting the trees; for there the trees were never demised, and the lord may enter and cut them. But where they are not excepted upon the demise, though after severance the property of them is in the lord, yet he cannot cut them; no more can the lord enter upon his copyholder, and cut the trees. But he said, that he would not give an absolute opinion as to that point. In the principal case judgment was given for the plaintiff. Afterwards error was brought upon this judgment in the Exchequer Chamber, and the judgment was affirmed there. And afterwards error was brought in Parliament, and both judgments were reversed *Munday 28 April 1702.* ten lords being for affirming, and eleven for reversing.

Atwood

Atwood *vers.* Burr.

A Writ of error brought upon an award of execution upon a *scire facias* against the bail was quashed, because the writ was, in *adjudicatione executionis judicii praedicti*, &c. where it ought to have been, in *adjudicatione executionis super recognitionem*. *Ex relatione m'ri Jacob.*

S. C. 1 Salk.
402.
Farrar. 3.
Carth. 447.
Lilly's Entr.
225, 290,
403.
Ante 328.
Post 321.
Error upon a
judgment in a
scire facias
upon a reco-
gnizance
quashed.

Mois *vers.* Bruerton.

Intr. Trin. 11 Will. 3. B. R. Rot. 167.

IN *assumpsit* brought by the plaintiff and laid in *Norfolk*, the defendant pleaded the statute of limitations. The plaintiff replied, and shewed a writ of *clausum fregit* brought within the six years in *Suffolk*, and continued there until this time. The defendant demurred. And in the Common Pleas judgment was given for the plaintiff there, that the replication was good, and that this writ of *clausum fregit* had avoided the statute of limitations. And now upon error brought, and the general errors assigned, the judgment was reversed. But in maintenance of the judgment 2 *Ventr.* 193, 258. were cited. But *per Holt* chief justice, though this writ of *clausum fregit* might be a sufficient process, to bring in the party, and compel an appearance, yet it cannot be an original, to avoid the statute of limitations. This way of proceeding is to eradicate all the principles of the law. If a plaint be levied in an inferior court within the six years, and then it is removed into the King's Bench by *habeas corpus*, and the plaintiff declares here *de novo*, and the defendant pleads the statute of limitations; the plaintiff may reply, and shew the plaint in the inferior court; and that will be sufficient to avoid the statute of limitations. *Ex relatione m'ri Jacob.*

Writ of *clau-
sum fregit* sued
in another
county will
not avoid the
statute of li-
mitations.
Ante 383,
434.
Post 380.

Plaint in an
inferior court
will avoid the
statute of li-
mitations.

Tilney *vers.* Norris.

Intr. Trin. 9 Will. 3. Rot. 182.

AN action of covenant was brought against an administrator for a breach of covenant in his own time for not repairing the premises. The *quaere* arose upon the declaration, it being alleged generally, *quod status de et in praemissis legitime devenit* to the de-

S. C. 1 Salk.
309, 316.
Carth. 519.
1 Ro. Ab.
929. B.
Cro. Jac. 647,
648, 671.
1 Saund. 112.

Covenant lies
against an ad-
ministrator of
a termor for a
breach of co-
venant in his
own time.

fendant; whether the administrator of a lessee for years is not chargeable in his own right in this case for a breach of covenant in his own time. And Mr. *Peere Williams* argued for the plaintiff, that this was a covenant which ought to be performed upon the land, and runs with it, and binds the assignee. 5 Co. 16. *Spence's case*. Moor 399. The dean and chapter of *Windsor's case*, 5 Co. 24. the same case. And the assignee of part shall be chargeable with this covenant, *Cro. Car.* 222. *W. Jones* 245. *Congham v. King*. And for the same reason an executor or administrator shall be chargeable as tenant of the land, as every other possessor is, for a breach of covenant in their own time. And if the law should be otherwise, it would be a great hardship to the landlord, who (as is said in the case of the dean and chapter of *Windsor* in 5 Co.) leased his land at a less rent for this consideration; for it may be, that the testator did not leave any *assets*; but that would be no hardship to the administrator, because he might waive the term, or assign it over, and discharge himself, if the premises were in so bad a condition, as not to be worth being repaired. And there are many cases which will warrant this, as 5 Co. 31. *Hargrave's case*. Debt against the administrator in the *debet* and *detinet* for rent incurred in the administrator's time; which case is the stronger, because it appeared, that the defendant was administrator, upon the declaration. 2 *Inst.* 302. The executor or administrator of a tenant for years shall be punished for waste done in their own time. And 1 *Andersf.* 52. that the judgment for the damages shall be against them *de bonis propriis*. And there is no difference between permissive and voluntary waste, that will influence this case, because this breach of covenant is in nature of permissive waste; except that the case of waste is stronger, because treble damages are recoverable there, but single damages only in covenant. And if the executor assigns over, waste will lie against him in the *tenuit*; therefore it is not hard, to support this action; and judgment shall be against him *de bonis propriis*. *Office of exec.* 280. A man may be charged as executor barely, where he might be charged as assignee, as *Allen* 42. debt will lie against an executor in the *detinet* for rent incurred in his own time. And therefore he admitted all the cases to be law, where in actions of covenant brought against executors for breaches in their own time, the judgments are *de bonis testatoris*; because in the said cases they are named executors, and charged as such; but in this case the defendant is charged as assignee, and as assignee he ought to be charged *de bonis propriis*. And for these reasons he prayed judgment for the plaintiff. And judgment was given for the plaintiff, *nisi*, &c. because no counsel attended for the defendant; though *Holt* chief justice said, that he had a mind to hear counsel of the other side. *Ex relatione m'ri Jacob*. Afterwards this was argued twice at the chief justice's chamber,

chamber, by Mr. *Pierre Williams*, and by serjeant *Wright* for the defendant; and after mature deliberation the plaintiff had judgment.

Rex vers. Toler.

MR. *S. Stout* mother of Mrs. *Sarah Stout* sued a writ of ap-^{s. C. Salk.} peal out of Chancery against *Spencer Cowper* Esquire, coun-^{176.} sellor at law, the youngest son of Sir *William Cowper* baronet, for the supposed murder of her daughter, in the name of an infant, who was a relation to the said *Sarah Stout*, and her heir; and before the writ was returnable, procured herself to be admitted guardian to the infant in the said appeal by the lord chief justice *Holt*. ^{It is a contempt in the sheriff to return a writ to an infant plaintiff, which writ was sued by guardian: 2 Bull. 59.} After this the friends and mother of the infant, being influenced by the *Cowpers*, went to the defendant who was undersheriff of *Hertfordshire*, with the infant, and demanded of him the writ of appeal, which the defendant delivered accordingly. And now this term, after the return of the writ was expired, Mr. serjeant *Levinz* and Mr. *Carthew*, being counsel with Mrs. *Stout* the guardian, made a motion in the King's Bench, to have a rule, that *Toler* should return the writ. And upon a rule made accordingly, that *Toler* should shew cause, why he should not return the writ, the whole matter appearing upon the *affidavits*, and that the writ was burnt, and so lost, the question was, whether the re-delivery of the writ by the defendant to the infant was a contempt to the court. And it was strongly argued for the defendant, that this was no contempt, because it was the suit of the infant, and the infant upon composition made might come into court, and disallow his guardians. ^{2 Roll. Rep. 59. Onley's case.} And therefore if the infant has his writ again, it is a sufficient excuse for the sheriff. That after the writ returned into the court, the infant may come and disavow the suit; and the court will discharge the guardians. ^{1 Roll. Abr. 288. D.} And if the infant has such power over the suit, after it is begun; *a fortiori* before the writ is returned. And Mr. *Ward* cited some cases, as *Dalt. 77.* that if the plaintiff order the sheriff, to let a man, who is in execution at his suit, go at large, and he does so accordingly; it is a good bar in debt for the escape. And ^{3 Bull. 98. Blamford v. Blamford,} that if in such case the sheriff refuse to let him go at large, an action of false imprisonment lies against him; and there the lord *Coke* says, that the sheriff is bound to take notice of the plaintiff. And ^{2 Cro. 379. Withers v. Henley} to the same purpose. It was urged also, that the guardian was not appointed, till after the writ was sued; so that when the writ was delivered to the sheriff, the guardian had nothing to do with it. And the practice of undersheriffs delivering writs

writs again to plaintiffs was well urged. But *per Holt* chief justice, there is a great difference between the re-delivery of writs to men of full age plaintiffs, and to infants plaintiffs. For the law takes great care of the suits of infants, that they shall not sue, but by such persons as the court appoints, because they cannot manage their own suits. And therefore the law will never permit such persons to dispose of writs out of court; who cannot prosecute a writ, when it is returned in court. But the sheriff has nothing to do, but to execute the writ. And therefore when the infant came to demand the writ of the defendant, the re-delivery to him, when he has no power to dispose of it, is no more than a delivery to a mere stranger, which is a contempt. And it is an insufferable contempt, when undersheriffs by these practices hinder justice. Whether there was a guardian appointed or not, signified nothing to him. If no guardian had been appointed, then upon the return of the writ, if the plaintiff had been called, and no person had appeared, the plaintiff ought to have been nonsuit, and the defendant discharged. See *Lateb* 178. But such discharge had been by course of law, and not in such manner as this, by anticipation of the court. If the court, upon the coming in of the infant, and disavowing of the suit, could discharge the guardian; yet the undersheriff out of court has no power to do it. And in the said case it is in the discretion of the court, and they may and ought to refuse

H. P. C. 199. to suffer it. And a *retraxit* entered is error. The case in *Roll's Reports* is not law. Besides, that if the plaintiff had been nonsuit after appearance, the defendant ought to be arraigned at the suit of the King, though he had been acquitted upon the indictment, and ought to have been put to plead, *autrefois acquit*. If the guardian had any thing to do with the writ, it is nothing to the purpose; for the writ is the King's writ, and ought to be returned in the court. And in the book of *Edward III.* an attachment was granted against a sheriff for not executing a replevin. There was also an objection, that the writ was not returned, and therefore the court could not take notice of it. To which *Holt* chief justice said, that the sheriff was the officer of the court, and they could examine him, what writs he had returnable here, and what was become of them. That it is the common practice. And where a writ of error is sued out of Chancery, to remove a record out of an inferior court, returnable here; if they sue execution afterwards, and before the return, this court will punish them. And he cited the case of Mr. *Starkey* in the time of the lord chief justice *Kelynge*, who was steward of *Windsor* court, where a complaint was made against him, for being judge, plaintiff, and bailiff; and Mr. *Starkey* at the bar said, it did not concern this court; but he was committed, for every such misdemeanor is inquirable here. And therefore he was of opinion, that

that this was a contempt in the defendant, and that he ought to be committed.

Turton justice was of opinion, that this was not a contempt. And he relied upon the common practice of re-delivering writs to plaintiffs; and said much, to induce a belief that the defendant did this ignorantly out of the simplicity of his heart.

Gould justice agreed in opinion with *Holt* chief justice, that this was a contempt; and took the same distinction between men of full age and infants, as to the withdrawing of writs; and said that this suit by appeal was different from all other suits by infants, for they cannot prosecute an appeal by *prochein amy*, though they may all other suits, but only by guardian. 27 Hen. 8. 11. a.

Infants can prosecute appeals only by guardian.

Toler was committed the last day of the term upon the report upon the interrogatories, and he was bailed the next day by Mr. justice *Turton* at his chamber. Afterwards in the vacation before *Trinity* term a petition was preferred to Sir *Nathan Wright*, lately made lord keeper of the great seal of *England*, to have a new writ of appeal granted. But upon the hearing of council on both sides for six hours and more by him, assisted by the lord chief justice *Treby*, the lord chief baron *Ward*, and Mr. justice *Powell*, whom my lord chief justice *Holt* sent in his place, and Sir *John Trevor* the master of the rolls, by the unanimous opinion of all of them the petition was rejected. And afterwards in *Trinity* term next following *Toler* was fined 200 marks. Upon which occasion *Holt* chief justice said, he wondered that it should be said that an appeal is an odious prosecution. He said, he esteemed it a noble remedy, and a badge of the rights and liberties of an *Englishman*. The statute of *Gloucester*, cap. 9. has provided, that it shall not be abated so lightly as before it had been; but if the appellant declares the fact, the year, the day, the hour, the time of the King, and with what weapon, the appeal shall be maintained. And 3 Hen. 7. cap. 1. which gives power to proceed at the suit of the King within the year, does yet save the appeal to the party after acquittal. And therefore since this remedy hath been favoured by acts of parliament, and tends to the support of families, and is of evident necessity in some cases (to say nothing of this present case, but only that a very odd method has been taken, and that too publicly avowed, for withdrawing of this appeal) the judges ought to encourage appeals. The court of King's Bench, to shew their resentment, committed *Toler* to the prison of the King's Bench for his fine, though the clerk in court would have undertook to pay it. And *Holt* chief justice said to *Toler*, that he had not been in prison long enough before;

New writ of appeal denied.

Appeal a noble remedy.

before; and that he might now, if he pleased, go to *Hertford*, and make his boast that he had got the better of the King's Bench.
Ex relatione m'ri Jacob.

S. C. 1 Salk.

10.

Trespass or
 case.

Bro. Action
 sur le Case,
 pl. 123.

All. 84.

1 Ro. Abr.

104.

2 Ro. Abr.

556.

Lane 65, 66.

Cro. Jac. 265,

266.

Prescription
 in a corpo-
 ration.

Distress.

Pitts *vers.* Gaince and Forefight.

IN an action upon the case the plaintiff declared, that the first of *October* in the year of the King that now is, he was master of such a ship, which ship lay then in *Ipswich* haven laden with corn in *quodam viagio tunc obligata ad Dantzick per ipsum* the plaintiff *fiendo*, and that the defendants entred and seised the ship, and detained her so long, *per quod impeditus et obstructus fuit in viagio praedicto*, to his damage, &c. The defendants justified the seizure as bailiffs to the corporation for toll, &c. But the plea for several defects in it was over-ruled; as, 1. That a prescription was laid in the corporation to have toll, &c. and it was not shewn, that this was a corporation time whereof, &c. 2. They said, that they detained the ship until they were paid the toll and charges; and title is made only to distrain for the toll. But Mr. *Ward* for the defendants did not pretend to maintain the plea; but he took exception to the action, that it will not lie, but that the plaintiff ought to have brought a general action of trespass. 41 *Edw.* 3. 24. Action upon the case against a miller, for that that he ought to grind his corn without payment of toll, he brought his corn to be ground, and the defendant took two bushels of peas, &c. and it was held, that the plaintiff ought to have brought a general action of trespass. He cited also *Palm.* 47. 13 *Hen.* 7. 26. *Lane* 65. and the cases of *Thornton and Austin*, *Hill* 4 *Will.* 3. *Mar. rot.* 1051. *C. B.* and *Pasch.* 9 *Will.* 3. *C. B.* *Hills v. Clerk*. [See the said cases before, p. 188.] Mr. *Hall* *e contra* for the plaintiff said, that in the said cases the property was in the plaintiff; but here the ship did not belong to the plaintiff, and he had no damage but the loss of his voyage. *Holt* chief justice: The plaintiff here might have had trespass, and declared that he was possessed of a ship, and founded his action upon the possession. But when he brings the action as master, he cannot have trespass, but case. A baillee may maintain trespass, but then he ought to declare upon his possession. So the master might have done here, and the defendants could not say that the ship was not his. But when he sues as master, he can recover only as officer, and therefore this action is more proper. Then Mr. *Weld* for the defendant took exception, that it is not said he had an intent to prosecute his voyage; for it may be, if he had not been detained by the defendants, he would not have made his voyage. But *per Holt* chief justice, it is enough for the plaintiff

to say that he had his cargo on board, and bound for such a place; for he has no need to say, that the wind was fair. Judgment for the plaintiff. *Ex relatione m^{ri} Jacob.*

The King against The mayor of Abingdon.

A Mandamus was granted, directed *Jacobo Courteen majori, ballivis, et omnibus principalibus burgensibus, burgi de Abingdon, praeter Johannem Sellwood et Johannem Spinnage*, reciting the letters patent constituting them a corporation, and how by the letters patent the commonalty ought to elect two out of the capital burgessees, to be mayor for the ensuing year; and the mayor, bailiffs, and capital burgessees, ought to elect one of them; and they shew the fact, that *John Sellwood* and *John Spinnage* were capital burgessees, and elected by the commonalty; and therefore it commands them, to elect one of them to be mayor; and it commands the mayor, to swear him, &c. To which writ of *mandamus* they return the act of 13 Car. 2. sess. 2. cap. 1. by which it is enacted, that if any person, after the expiration of the commission there mentioned, shall be elected into any office in a corporation, who shall not have taken the sacrament according to the rites of the church of *England* within one year before such his election, the election shall be void; then they say, that within twenty years after the twenty-fifth of *March* 1663 *John Sellwood* and *John Spinnage* were elected capital burgessees, and that within one year before their election they had not received the sacrament according to the rites of the church of *England*, *per quod electio eorum vacua devenit, et quod non sunt principales burgenses burgi praedicti*, &c. Several exceptions were taken to this writ, and this return; but the principal of them, and those which were adjudged, were these. 1. The exception to the return was, that the merits of the return, *viz.* that *Sellwood* and *Spinnage* were not capital burgessees, could not be proved by it; for though it was true, that within twenty years after the twenty-fifth of *March* 1663 they were elected capital burgessees, and were not qualified, yet they may have qualified themselves, and may have been elected capital burgessees again since; and if that be true, they may be capital burgessees at this hour; and then though they were not qualified when they were elected first, that is no reason why one of them should not be elected mayor; therefore they should have added to the return, that they were never elected since. For answer to which it was said, that the last words, *et non sunt principales burgenses burgi praedicti* was a positive direct affirmation of itself, that *Sellwood* and *Spinnage* were not capital burgessees, and a sufficient answer to the writ without more saying; and a general potive return is good, 1 Sid. 209. But all the court held

Returns ought
to be certain.

held the exception good. And *Holt* chief justice said, that if the words, *et non sunt principales, &c.* had been omitted, the special matter in the return would not have been good and sufficient. The writ suggests an election, which the court must intend to be true; and the defendants avoid it by inference, which is not conclusive. The defendants shew, that within twenty years after the twenty fifth of March 1663 *Sellwood* and *Spinnage* were elected, &c. within the year before which election they had not received the sacrament; which avoids the said election, but does not exclude a subsequent election. Returns ought to have the most exact certainty that the law approves, because they cannot be traversed, nor hath the party the benefit of interpleading; and therefore the whole matter ought to be so certainly laid before us, to the end that we may judge whether the cause returned be sufficient or not. Now if this matter had been pleaded in a bar (which is good if it be certain to a common intent) the plaintiff might have replied a subsequent election. And if it be so, that that is not excluded by the return, the return cannot be good, because it does not answer the point of the writ, *viz.* that they are principal burgesses. The time of the election ought to have been shewn, *viz.* that such a time *Sellwood* was elected, and that within one year before, &c. and that he was not elected since. We know in fact, that subsequent elections have been made. *Bethell* was elected sheriff, and not being qualified, he received the sacrament, and was elected another time. Then here the *et non sunt principales, &c.* will not make it good; for that is only by inference, to warrant which there are not sufficient premisses, it being coupled to the former part of the sentence by the copulative *et*.

Mandamus
directed.

Two exceptions were taken to the writ. 1. That it is ill directed; for it ought either to have been directed to the corporation by their corporate name, or otherwise to the members of it by their natural names; for the law makes no other distinction of persons. But it is here directed to the mayor, bailiffs, and capital burgesses, who are but part of the corporation, for the corporation is the mayor, bailiffs, and burgesses, and there is no such corporation as this. And for this exception in a *mandamus* to this town of *Abingdon* the writ was quashed. *T. Jones* 52. *Holt's* case [father to the chief justice.] But *per Holt* chief justice, though the case in *Jones* is in point, yet it was never esteemed to be law at any time since. And he said, that he remembered that his brother *Pemberton* and Sir *William Jones*, who were at the bar then, wondered at the resolution, and so also did the whole bar. If the writ is directed to the corporation, it has been held good. But if it be directed to those, who by the constitution of the corporation ought to do the act, without doubt it is good also.

There

There have been a hundred writs directed to the mayor and aldermen of London in cases of acts to be done by them separately; and that is the course of all mandatory writs. And wherefore must it be directed to the whole corporation, when the rest of them do not obstruct the doing of the thing, nor have any power to execute the command of the court?

2. The second exception to the writ was to that part of the writ which commanded the mayor to swear *Sellwood* and *Spinnage*, that they sued this too soon; for a *mandamus* ought not to go, until the officer has refused to do the act, and his duty; or at least that there was some person, who had right to have the thing done to them; which was not in this case, because they were not yet elected. That this was to sue a *mandamus quia timet*, and like the case of an original bearing *teste* before the cause of action accrued. But *per Holt* chief justice, it will be well enough in this case, because they are acts depending the one upon the other; first they ought to elect him, and then the mayor ought to swear him. And the writ was held good, and the return disallowed, and a peremptory *mandamus* was granted. *Ex relatione m'ri Jacob.*

Slabourne *versus* Bengo.

IN ejectment the plaintiff declared upon two several demises, *habendum tenementa praedicta, &c.* by virtue whereof he entered, and was possessed, *quousque* the defendant entred in tenementa, and the plaintiff *expulit et amovit a termino suo praedicto inde nondum finito, &c.* Mr. Northey moved in arrest of judgment, that *tenementa praedicta* was uncertain, and therefore ill, for it did not appear which. The same of *termino suo praedicto inde nondum finito*, which makes the former objection the stronger, because it complains but of one. But the court held the first to be well enough, and that it would extend to both. And as to the other, if it had been omitted, the declaration had been well enough, and therefore it would not hurt it. Judgment for the plaintiff. *Ex relatione m'ri Jacob.*

Rex *vers.* Newman.

A woman cannot have two Christian names.

THE defendant was indicted by the name of *Elizabeth Newman alias Judith Hancock*, for keeping a bawdy house. Mr. King moved to quash it, because a woman cannot have two *Christian* names; for which reason in a case in *Noy* the return of a *rescous* was quashed. And for this reason the indictment was quashed. *Ex relatione m'ri Jacob.*

Traverse of the wrong writ in debt upon a bail-bond.

IN debt upon a bail-bond the defendant pleaded the statute of 23 Hen. 6. cap. 10. and shewed an arrest by a wrong writ. The plaintiff replied and shewed the right writ, and traversed the wrong writ. The defendant demurred. And exception was taken, that the plaintiff should not have traversed the wrong writ, according to 1 Saund. 22. *Bennet v. Filkins.* Holt chief justice. The plaintiff has no need to traverse the wrong writ, but only to reply the right writ, and rely upon that. For it may be, there were two writs, and the defendant might be arrested by virtue of the writ returnable *die Martis*, &c. and then the other writ might come to the sheriff returnable *die Mercurii*, which coming to his hands, when the defendant was in custody, amounts to an arrest in law, and he might give a bail-bond to appear upon it; therefore the traverse is not so good. But the plaintiff had judgment. *Ex relatione m'ri Jacob.*

Hilliard *vers.* Cox.

S. C. 1 Salk. 37.
Comb. 392.
Debt upon simple contract is such where the person of the debtor abides.

AN action upon several promises by an administrator. The defendant craves *oyer* of the letters of administration, by which administration appeared to have been committed to the plaintiff by the archdeacon of *Berks*, and he pleads, that at the time of the death of the intestate, and committing of administration, he was inhabiting and resident at *Oxford*. The plaintiff demurs. And Mr. *Northey* took exception to the plea, because the defendant did not deny, nor traverse, his residence in *Berks* within the peculiar. Holt chief justice. If the debtor has two houses in several dioceses, and at the time of the death of the debtee and commission of administration, is inhabitant and resident at one of the houses; that will exclude the jurisdiction of the ordinary of the diocese, in which the other house stood. Judgment for the defendant. *Ex relatione m'ri Jacob.*

Rex

Rex *vers.* majorem Rippon.

A *Mandamus* was directed to the mayor, aldermen, and commonalty of Rippon, to restore Sir Jonathan Jennings, to be alderman of Rippon. They in their return take advantage of the misdirection, and shew, that they are incorporated by another name, *viz.* the mayor, burgesses and commonalty, but prececedent to the substance of their return; and they say, that Sir Jonathan Jennings on such a day in open assembly in the town, *libere, personaliter, et debito modo*, surrendered his office of alderman of Rippon, and declared, that he would not continue, *et deservire in officio praedicto* any longer, by which means the office became void, and they elected another in his room. Mr. Mulso took exception to this return, that it not being shewn in the return, that he surrendered by deed; it must be intended, that he surrendered by parol, and then it will not be good; for he has a freehold in his office, since he ought to continue for his life, unless he be removed for good cause. And the freehold of a thing which lies in grant, cannot be granted or surrendered without deed. *2 Roll. Abr. Grants. 1 Ventr. 296. Co. Li. 338. 2 Roll. Rep. 20. Cro. Car. 198, 259.* And as to the case of the King and Tidderly *1 Sid. 14.* he said, that was only a burgess. Mr. Northey *e contra* said, that since Sir Jonathan Jennings came in by election without any deed, he might surrender without deed. And he relied upon *1 Sid. 14.* where Hale chief baron said, that it is incident to a corporation, to take a resignation of their members. But however the return positively affirms, that the surrender was *debito modo*; and if that is false, Sir Jonathan Jennings may bring his action. Holt chief justice. If a man speaks at large, that he will not be alderman, &c. that signifies nothing. But *e contra*, if he comes in an open assembly of the corporation, and there resigns his office, and declares, that he will not continue in it longer, and desires them to accept his resignation, and they accept it, and elect another in his room, it is a good resignation. Indeed if it was an office, which lay in grant by deed, there ought to be a deed to surrender it; but when they are made by election, the corporation may accept a surrender by parol before them. In London the aldermen send letters to acquaint the lord mayor and court of aldermen that they resign; and if another be elected in their place, it is a good resignation: indeed they may revoke it, before their place is supplied. [Mr. Crispe common serjeant of London said, that Sir Thomas Allen sent a letter, &c. that he resigned his place; but before another was elected, he came and disavowed it.] And if it be a good resignation of the office of alderman

S. C. Salk.
433.
Office of
alderman con-
ferred by elec-
tion may be
surrendered
by parol.
1 Vent. 19.
1 Lev. 148.
2 Show. 66.

Aldermen of
London resign
by letter.

Sir Thomas
Allen's case.

Resignavit a
good return.

An action lies
against parti-
cular persons,
who cause a
false return to
be made to a
mandamus in
the name of a
corporation.

alderman of London, why not of Rippon? But if a deed were necessary, it is not excluded by this return, for if there was a deed, it has no need to be shewn to the court; and therefore *resignavit* generally does not imply a resignation by parol, but rather a resignation by deed; because if there was no deed, there was no resignation; and if there was no sufficient resignation (as it is positively shewn in the return that there was, which is enough for them to say) an action will lie for the false return. And therefore the return was allowed for the merits. But Mr. Northey took exception to the *misnomer* of the corporation in the writ. And *per Holt* chief justice, if a *mandamus* be directed to a corporation as a corporation, and there is no such corporation, the writ is ill. There may be aldermen in this corporation, and it may be they are not part of their corporation. But that was not adjudged. Mr. Mulso in *Trinity* term next following came and moved for a new writ of *mandamus*, because this was wrong directed, and therefore they could not have an action against the corporation for the false return of it; and they would be bound, to take no exception to the return, but only to intitle Sir Jonathan Jennings to try the right. But *per Holt* chief justice, they may bring an action against the particular persons, who caused this return to be made in the name of the corporation. And so it was resolved in the case of *Enfield v. Hills* in a *mandamus* directed to the city of Canterbury, and an action brought for a false return against the particular persons, and a bill of exceptions brought, and the exception taken, that it would not lie against the particular persons, and over-ruled. And therefore in regard that the return was allowed upon the merits, and that Sir Jonathan Jennings is not without remedy, it is vexatious, to grant a new writ. And upon three several motions for a new writ made by Mr. Mulso it was denied. But Turton justice inclined to grant the writ. *Ex relatione m'ri Jacob.*

Tomkin *vers.* Crocker.

S. C. 1 Salk.
49.
Carth. 250.
Lutw. 1211.
Writ of error
is not amend-
able.
Ante 71.
Stat. 5 Geo. 1.
cap. 13. sec. 1.

MR. Northey moved for leave to amend a writ of error by the instructions given to the curfitor, which were right, for removing a record of a judgment *in curia nostra et nuper reginae*, but the writ was *in curia nostra*; which mistake he prayed might be amended. For original writs are amendable. 8 Co. 156. *Blackamore's* case. And (by him) the difference is, where the clerk has nothing to guide him, but he makes a mistake for want of skill; there the court will not amend; but where his instructions guide him to avoid the mistake, but by negligence he makes it otherwise than his instructions warrant, it is otherwise. But Mr.

Cowper

Cowper and *Mr. Boulton* opposed the amendment, because this was a writ of error. For by the common law no original writ was amendable; and the 8 Hen. 6. cap. 12. gives power to the justices, to amend, only in affirmance of judgments, so that for such misprision of the clerk no judgment shall be reversed; which cannot be extended to the amending writs of error, because the intent of them is to reverse judgments. 2. That this writ by reason of this misprision does not remove the record. 1 Roll. Abr. 754. n. 7. 13. And therefore such amendment will give a new effect to this writ, which is very material in this case; for the writ of itself is a perfect writ, and has no fault in it; and nothing is returned, which shews a fault in it: and then their demand is, to have a new writ made, to remove a record in the time of another King. And *Mr. Boulton* cited 28 Hen. 6. 11. b. where a writ of error was directed *Johanni Presor*, to remove a record *coram vobis*, omitting *et sociis vestris*; and upon praying to be amended, it was refused. *Mr. Northey* e contra said, that it is indifferent upon the writ, whether the judgment shall be affirmed or reversed. But however the statute must be understood, in affirmance of judgments upon the writ which is to be amended; and therefore suppose a writ of error brought, and judgment of reversal given, and a writ of error brought upon that; the amendment of the first writ of error will be in affirmance of the judgment. And he said, that he moved Mich. 1 Will. 3 Mar. B. R. between *Blake* and *Bradford* for amendment of a writ of error, but the instructions in the case did not warrant it; otherwise he conceived, that the amendment would have been granted. But *per Holt* chief justice, no precedent can be shewn, where a writ of error has been amended; which is a great argument, that it cannot be done: and it is contrary to the design of the statute which was to support original judgments, and avoid writs of error, which tend rather to the reversal of the judgments, being sued for that purpose. And what *Mr. Cowper* says, is very considerable, that the writ is a good writ; for the King's Bench has no authority to amend it, because it does not suit the present case; and then as the amendment is granted or not, the record will be removed or not, and we shall have a record before us or not, and so by the amendment of this we shall make ourselves a commission. *Could* justice. If it cannot be amended by common law, it cannot be amended upon this act. And 1 Leon. 134. a matter which was a mere slip of the clerk, was refused to be amended, because it would avoid the judgment. And the amendment was denied. *Ex relatione m^{ris} Jacob.*

Paramore *vers.* Johnson.

Intr. Mich. 11 Will. 3. B. R. Rot. 90.

S. C. Cases in
B. R. 376.*Indebitatus assumpsit*, accord
pleaded does
not amount to
the general
issue.

IN *indebitatus assumpsit* brought against the defendant he pleaded an accord for 20*l.* with satisfaction made, &c. To which plea the plaintiff demurred specially, and assigned for cause, that the plea amounted to the general issue. And it was argued for the plaintiff, that this matter might have been given in evidence upon the general issue pleaded. But *per Holt* chief justice a man may plead matter, which might be given in evidence upon the general issue pleaded; if he admits a cause of action in the plaintiff, and avoids it by matter *ex post facto*; because such a plea gives colour to the plaintiff, as *Leyfield's* case, 10 Co. 88. is. And as in debt for rent a man may plead a release, or may give it in evidence upon *nil debet* pleaded. The same law of entry and suspension. But to say the truth, the admitting the giving payment or accord with satisfaction in evidence in *indebitatus assumpsit* is not proper, but it is only indulgence. And therefore he held the plea good. *Sed adjournatur.*

Boiture *vers.* Woolrick.Damages under 40*s.* in
trespass, assault,
battery, wounding,
and disturbance in
quiet possession.Gilb. Eq.
Cases 195.

IN an action of trespass *quare clausum fregit*, of assault, battery, wounding, and of disturbance of him in his quiet possession, &c. upon not guilty pleaded, a general verdict was given for the plaintiff, and damages under 40*s.* And Mr. *Brantwaite* moved to have full costs, because the defendant was found guilty of a wounding, and disturbance of the quiet possession. But *per Holt* chief justice, the practice has been always otherwise; and he said, that he did not remember such a motion to have been made. But *Gould* justice said, that he moved such a motion as to the peaceable possession here in the King's Bench, but it was denied him. And the motion here was denied.

Chancellor
Somers removed.Commissioners of the
great seal.

Memorandum, Saturday the twenty-seventh of April in this term the earl of Jersey one of the secretaries of state by command of the King took away the great seal from the lord Somers. And the seal was not disposed of until Sunday the fifth of May, at which time it was delivered by commission to the lord chief justice Holt, the master of the rolls, the lord chief justice Treby, and the lord chief baron Ward. And Thursday the twenty-first of May Mr. secretary Vernon

Vernon came, and took away by command of the King the great seal from the commissioners, and the King in council delivered it to Sir Nathan Wright one of his serjeants with the title of keeper of the great seal, &c.

The hamlet of Spittlefields *against* the parish of St. Andrew Holbourn.

J. S. an infant born in the parish of *St. Andrew* was nursed in *Spittlefields*, the father died, and the mother ran away. Neither the father nor the mother had any settlement in *St. Andrew's*, but were only lodgers there. This child being become likely to be chargeable to the parish of *Spittlefields*, was removed by order of two justices to the parish of *St. Andrew*, being the place of its birth. Upon appeal from the said order to the quarter-sessions it was quashed, the justices being of opinion, that bastards did not gain a settlement by their birth. And upon motion in *B. R.* this order of the sessions was quashed, and the order of the two justices confirmed; because a child ought to be maintained where it is born, unless it obtains another settlement. And therefore it is incumbent upon the parish where it is born, to find another place of settlement.

A poor infant ought to be maintained by parish where it was born, if it has not obtained another settlement. Shaw's Par. Law, cap. 37. s. 65.

Trin.

Trin. Term

12 Will. 3. B. R. 1700.

Sir John Holt Chief Justice.

Sir John Turton

Sir Henry Gould } Justices.

Nottingham *vers.* Jennings.

S. C. 1 Salk.

233.

1 Williams

23.

S. C. Comyns

82.

A. has issue three sons, B. C. and D. being seised in fee of lands A. devises them to C. and his heirs for ever, and if C. die without heirs, then he devises them to his own right heirs. C. has but an estate in fee-tail.

IN ejectment brought by the plaintiff against the defendant upon not guilty pleaded, it was tried before *Holt* chief justice at the sittings in *Middlesex*; and upon the evidence the case was thus. *John Jennings* being seised of the lands in question in fee had issue three sons, and being so seised, devised them to *Daniel* his middle son and his heirs for ever after the death of his mother, and if *Daniel* died without heirs, then he devised them to the right heirs of himself the devisor for ever. And the question arose between the daughters and heirs of *John Jennings* the eldest son of the devisor who were lessors of the plaintiff, and the devisees of *Daniel Jennings* defendants, whether *Daniel Jennings* had but an estate-tail by the will, or an estate in fee-simple? If an estate-tail, then it must be for the plaintiff; if fee-simple, then for the defendants. And this matter upon the trial was referred to the chief justice as a point of law, who gave order that it should be argued in court. And Mr. *Northey* for the plaintiff argued, that it was but an estate-tail in *Daniel Jennings*; because it appears, that it was devised to him only by a provision, and not absolutely; and therefore of necessity the court must restrain the word heirs, to heirs of the body of *Daniel*. And that this was the intent of the devisor, appears plainly from hence, that *Daniel* could not die without heirs general, so long as any heirs of the testator were alive; for the heirs of the body are the only heirs, without leaving which, *Daniel* could die, so long as the devisor had any posterity remaining. And this does not differ from the common case of a

devise

devise to a man and his heirs, and if he dies without issue, remainder over; for the reason why such devise is an estate tail is, because the last words shew the intent of the devisor, what heirs he intended. And the case of *Webb v. Hearing*, Cro. Ja. 415. is the case in point; where a man devises his house to his son after the death of his wife, and if his three daughters, and either of them do overlive their mother and their brother and his heirs, then to them for life, remainder over; and it was held in the said case, that the son took an estate tail only, for the very reason that he urged in this case, viz. because the son could never die without heirs, living the daughters, if it was not heirs of his body, they being his collateral heirs. And in the said case, as it is reported in 1 Roll. Rep. 399. My lord Coke puts the case in question, and holds, that it would be an estate tail in the younger son. So it is held 1 Roll. abr. 836. pl. 6. because the elder son is the heir general. There was a case Hil. 27 & 28 Car. 2. B. R. *Tilley v. Collier*, where a man seised in fee had issue three daughters, A. B. and C. and devised his land to his wife, until his heir A. arrived at the age of twenty-one years, and that his heir A. should pay his debts; and that if his heir A. died without heir, that then his heir B. should pay his debts, &c. and the court took notice; what heir he meant, and held this to be an estate tail in A. There is a note of the said case in 3 Keb. 589. As to the case of *Hearne v. Allen*, Cro. Car. 57. where a man devised lands to his son and his heirs, and if he died without heirs, then to the daughter and her heirs, &c. where it was held, that the eldest son took a fee, and not an estate tail; the court was divided there three against two; but there was another point flat against the daughter, viz. the collateral warranty; and the case in 2 Cro. was not mentioned there, and therefore we hope, that it shall not be an authority against the present case, which is agreed, 2 Cro. 428, 448.

Mr. *Cartbaw e contra* argued for the defendants, that he would attempt to make a distinction between this case and the case of *Webb v. Hearing*, which case he took to be a middle case between the case of 19 Hen. 8. 8. b. and the case of *Hearn v. Allen* in Cro. Car. which is the case in point. For where there is a devise over to a stranger, as in the case in Hen. 8. there the first devisee has a fee, and the remainder over is void; and so where the devise is positive, as in the case of *Hearn v. Allen*, and in express words, the remainder over will be void. But in the case of *Webb v. Hearing* the son took the fee simple only by implication; and therefore as his estate was created by implication upon the construction of the will, the said estate may be qualified more easily; but the court will not give so much favour to an implication, as to overthrow an express devise; and therefore these resolutions may stand together,

together, and the court will be rather inclined to make such interpretation; because the clause which should restrain the estate of the son, is a void clause, and has no operation; for it does not vest any estate in the right heirs by devise, but they are in of the reversion by descent; and therefore it is *pro tanto* more hard, that a clause which is merely void, should controul an express devise.

To which Mr. *Northey* for the plaintiff answered, that he did not pretend, that this clause has any operation, to pass the estate, but that it declares the intent of the testator, that the second son should not have the land absolutely, but that some other person should succeed him. And as to the other objection, that the son should have the estate by implication, that makes no difference as to the plaintiff; for the only question is, concerning the construction of the word heirs.

Holt chief justice said to Mr. *Cartbew*, that he did not take all the advantage of the case of *Hearne* and *Allen* that he might; for if the said case were law, it went farther than the case in question; and so on the other side, that he did not answer the case of *Webb v. Hearing*. And the chief justice said, he permitted this point to come before the court only out of respect to the case of *Hearne v. Allen*. The case in *Henry VIII.* is, where the remainder is limited to a stranger, which no body ever thought good; for in the said case there is nothing to explain what heirs the devisor intended. But where the limitation is among relations, as in this case, there the word heir cannot mean any thing but issue; for the son cannot die without heir, so long as the father has any heir remaining, which is the reason of *Webb* and *Hearing's* case. And as to the limitation over to his own right heir, that it is void; though it is not good in point of limitation, yet it explains the intent of the testator; as if a man devises land to *J. S.* and his heirs, and if he die without issue, then to the right heirs of the devisor; it is a good estate tail by devise, though his own right heirs are in by descent.

And *Gould* justice, that he would not make any difference between this case and the case of *Webb* and *Hearing*. That there the estate of the son arose by implication, though that did not govern the resolution, as one may see in *Moor* 852. but the reason of the said case was, because the intent of the testator appeared from the words of the limitation over the son, which would signify nothing, unless the son's estate was an estate tail. And the court in this present case made a rule, that the *posse* should be delivered to the plaintiff, and that judgment should be entered for him.

Rex *vers.* Raines,

or

Pett *vers.* Pett.

SIR Peter Pett had a sister *A.* *A.* had issue *B.* and *C.* her daughters. *C.* had issue a son *D.* and died. Then Sir Peter Pett died intestate. *B.* obtained letters of administration in the Spiritual Court. Upon which Mr. Lechmere in behalf of *D.* great nephew to Sir Peter Pett, moved the court of King's Bench to grant a *mandamus* to be directed to the Spiritual Court, to command them, to compel the administrator to make distribution. Upon which the King's Bench made a rule, that counsel on both sides should be heard, whether such *mandamus* should be granted or not. Upon which at the day appointed by the rule of Mr. Lechmere for the *mandamus* argued, that the question of this case arose upon the clause of the 22 & 23 Car. 2. cap. 10. sect. 7. provided that there be no representatives admitted between collaterals after brothers and sisters children; and sect. 7. clause 3. and in case there be no child, then to the next of kindred in equal degree of or unto the intestate and their legal representatives as aforesaid, and in no other manner whatsoever. And first he observed, that the courts of the common law always favoured distributions, and had always construed the statute accordingly. To prove which, he cited the case of *Smith v. Tracy*, 1 Vent. 307, 316, 323. where it was adjudged, that a brother of the half blood should be admitted to have distribution with a brother of the whole blood of the intestate; and the case of *Palmer and Allicock*, 3 Mod. 58. where a man died intestate without wife, leaving only one son, and administration was granted to the son, who afterwards died intestate; and the question was, whether the next of the blood of the father, or of the son, should have letters of administration *de bonis non*; and as to that the question was, if the son should have the goods of the father as an interest vested in him as distributee by the second clause in the seventh section of this act, which says, that in case the intestate leaves no wife, that all his estate shall be distributed equally amongst his children: and it was held, that the son, though he was but one child, was within the word children; and that he took it as an interest vested, and that therefore administration *de bonis non* of the father should be granted to his next of blood.

Then this question not being among distributees, in what proportion distribution shall be made, but whether any distribution shall be granted at all, or whether the administratrix shall have the whole.

S. C. 1 Salk. 250.
1 Williams 25, 27, 51.
No representatives are to be admitted in for distribution after children of brothers and sisters of the intestate.
2 Show. 286.
2 Vern. 168.
3 Salk. 138.
12 Mod. 409.
Wms. 594.
595.
S. C. Comyns 87.

whole. The great nephew is intituled to the more favourable construction of the act of parliament. The mischief before the act was, that the administrator carried away the whole personal estate of the intestate; and therefore this act was made, to let in the relations of the intestate in such a degree of proximity, to such a share as the statute directs, as the law of reason requires, and as one may conclude that the intestate himself would have done it, if he had made his will. And therefore this being a remedial law, ought to be extended as far as the words or reason of it will permit for advancing the remedy. The statute gives an equal share to collaterals in equal degree; and as representatives have the right of their stock, and therefore among lineals are admitted *in infinitum*; so it will be reasonable, to extend it amongst collaterals, as far as the words will permit. The words of the proviso are strong, but they do not affect this present case; because it preceeds the clause, which provides for this case. Like the case of *Gainsford v. Griffith*, 1 *Saund.* 60. where it is held, that a restrictive clause intervening in the middle of one or two sentences, shall not be applied to the latter part. And there is the more reason, to make such construction in this case; because in the former clause they were to take part of the estate with the wife, whereas in this case the question is only between the one and the other. But then if it shall be extended to restrain this clause, it shall be understood of the children of brothers and sisters of collaterals, *viz.* brothers and sisters in the present case, and not of the children of brothers and sisters of the intestate, for collaterals is the next antecedent; and the question arising about representatives, the persons representing ought to be accounted from them. And this is agreeable to the other parts of the statute, for the statute gives distribution to the next kindred of equal degree and such as represent their stocks, *sect.* 3. and *sect.* 6. The estate ought to be distributed among the next of kindred, and those who legally represent them; so that it is the next of kindred, it is the collaterals, who are represented; as in *sect.* 5. it is the children who are represented; and the clause will stand in this manner; provided that collaterals shall be represented by none but brothers and sisters children, which must necessarily be understood, the children of the brothers and sisters of the collaterals; and in such sense the whole act will stand together.

As to authorities, he said that he knew none in the case but that of *Carter and Crawley*, the argument of which case made by the lord chief justice *North* is in *Raym.* 496. But three judges were of a contrary opinion to him, *viz.* that the distribution should be extended to the collaterals, *viz.* *Ellis*, *Wyndham*, and *Charlton*, and that a consultation should be granted; a rule was made *nisi*, &c. and afterwards Mr. justice *Ellis* died, and *Levinz* was made a justice

justice of the Common Pleas; and then the rule for the consultation was made absolute by the opinion of two judges against the opinion of the chief justice, and *hæsitante Levinz*, who had not heard the arguments. He added farther, that the parliament in making this law had regard to the civil law, and designed as to this point to establish it; and therefore he cited some cases out of the books of the civil law, to prove that distribution ought to be made in such case. *Justinian. Instit. lib. 1. tit. 7. lib. 5. tit. 7. Grot. de jure belli et pacis, lib. 2. cap. 7. sect. 1. num. 30, 31. sect. 11. num. 1. and Puffendorf de jure naturæ et gentium.*

E contra Mr. Harcourt argued, that such distribution would be, 1. Against the words of the act of parliament. 2. Against the intent. 1. The words are express, that no representations shall be admitted among collaterals after brothers and sisters children. Then, 2. Admitting the intent of the act to have been, the setting up of the civil law; yet as it appears by the opinions of the learned civilians certified under their hands at the end of my lord North's argument, as it is reported in *Raymond*, it is a constant rule among them, that *repræsentatio in filiis fratrum et sororum tantum locum habet, ad ulteriores vero collaterales non extenditur*. And it is another rule, *quod vocantur ad successionem reliqui collaterales, quicunque in gradu sunt proximiores, remotioribus exclusis, ita quod infallibiliter semper prior in gradu sit prior in successione*. And this point has been since determined in Chancery before the lord Somers, whilst he was there, in the case of *Maw and Harding*, that the statute should be understood of the children of the brothers and sisters of the intestate; and the bill there, which prayed distribution in the present point, was dismissed. Besides, that executors and administrators are favoured in law; and therefore this act of parliament, which takes away their profit, and leaves them the care and pains, shall not be extended, to carry distribution against them beyond the letter of the law. If this had been a question for administration upon the 21 *Hen. 8. cap. 5.* the plaintiff could not have had letters of administration, because the defendant is nearer of kin than he; and therefore the judges in the exposition of this act will favour proximity of blood, which is favoured by other laws concerning the same matter, and will not give the estate of the intestate from the nearer to the remoter relations.

Note, this case of *Maw v. Harding* was adjudged 20 July 1693. And in another case between *Beerton and Dakin* decreed in Chancery 28 July 1690. the same point was determined, as Mr. Vernon related to me, March 8. 1717.

Holt chief justice: That he was always of opinion, that in the spiritual court the law was understood to be according to what is certified by the civilians in the end of my lord North's argument, and that their practice was agreeable; which opinion was given upon very good advice. But if the plaintiff apprehends, that the

civil law is with him, he may appeal, and upon that he will have the advantage of it. Certainly the intestate must be construed the correlative to brothers and sisters children; because the intestate is the intire subject of the act, the provision is made for his wife and children, and the division is to be made of his estate. This act was penned by Sir *Walter Walker* in the time of my lord chief justice *Bridgman*, when he was chief justice of the Common Pleas. He had the liberty to argue there for the power of the spiritual court in granting distributions; and after he had argued for three hours, *Bridgman* chief justice inclined in opinion to Sir *Walter Walker*, but the other judges opposed it; and it never obtained in *Westminster-hall*, but prohibitions were granted upon the first motion. And when he could not obtain his point in the courts of law, he procured an act of parliament, which was restrained as here of purpose. And *Gould* justice said, that the words in this clause, upon which the plaintiff relies, are, their representatives as afore-said; which must mean what they are allowed to mean in the proviso, and then it will stand upon the words of the proviso. And *Holt* chief justice said, that in *Tracy's* case a prohibition was granted, but afterwards a consultation was awarded upon great debate. And by the opinion of the whole court the rule was discharged.

Mutford *vers.* Walcot.

S. C. 1 Salk.
129.
Acceptance to
pay a bill of
exchange after
the day of
payment past,
*secundum teno-
rem billae*,
good.
Ante 364. S.P.

IN *assumpsit* the plaintiff declared upon a bill of exchange drawn the twenty-eighth of *October* at double usance for 700 ducats payable at *Amsterdam*, which the defendant accepted the thirty-first of *December* following, *per quod devenit onerabilis* to pay the bill, *et in consideration inde* the same day and year he assumed to pay it *secundum tenorem et formam billae praedictae*. Upon *non assumpsit* pleaded, verdict for the plaintiff. Sir *Bartholomew Shower* moved in arrest of judgment, that the time of payment of the bill being expired at the time of the acceptance, it was impossible that the defendant should assume to pay it *secundum tenorem billae*, for that was out of his power. And though this acceptance was within the three days of grace, *viz.* the last day, within which time payment is good, and no protest for want of payment can be made, until the said days are elapsed; yet it is a breach, not to have paid the money within the usance; and the plaintiff has no need to say in his declaration upon a bill of exchange, that he did not pay it within the days of grace; but if the fact was, that it was then paid, it ought to be shewn of the other side. So that here the time of payment was elapsed at the time of acceptance; and therefore it was impossible to accept it then, to be paid *secundum tenorem billae*.
And

And this objection is the stronger in respect of the distance of the place; for admitting, that payment within any of the three days of grace would be according to the tenor of the bill, yet when the acceptance here was upon the last of the said days, it was impossible to pay the money the same day to the plaintiff at *Amsterdam*. 2. The acceptance here is not good, because no house is mentioned, where the bill should be paid. Mr. Hall for the plaintiff cited the case of *Jackson and Pigot*, as a case adjudged in point. [See it before, *Mich. 10 Will. 3. p. 364.*] And Mr. Northey for the plaintiff said, that there might be some difficulty, if the action had been brought against the first drawer, but none where the defendant is chargeable by his own acceptance; for a man may tender a bill to be accepted after the time of payment is expired, to oblige the acceptor, if he will accept it, but not to affect the drawer.

Per Holt chief justice: There must be such acceptance as will bind the acceptor, and that is sufficient. As if a bill of exchange be payable at *London*, and the person upon whom it is drawn accepts it, but names no house where he will pay it; the party that has the bill is not bound to be satisfied with this acceptance, but nevertheless if he will be content with it, it will bind the acceptor. So if *A.* draws a bill upon *B.* *B.* refuses to accept it, *C.* rather than it shall be protested accepts it for the honour of *A.* this acceptance will bind *C.* So if a man offer to *B.* a bill of exchange payable in *Amsterdam*, *B.* refuses to accept it unless some merchant in *London* will sign it; if the merchant signs it, he becomes acceptor for the honour of the drawer. Acceptance after the day of payment is common, and there is no inconvenience in it. And *Holt* chief justice said, that he remembered a case where an action was brought upon a bill of exchange, and the plaintiff declared upon the bill, where it was negotiated after the day of payment; and a question was made, whether the plaintiff could declare upon the bill, or whether he ought to bring *indebitatus assumpsit*? and he said, that he had all the eminent merchants in *London* with him at his chamber at *Serjeants inn* in the long vacation about two years ago; and they all held it to be a very common, and usual, and a very good practice. And as to the matter of the *secundum formam, &c.* it is the payment of the money that is the substance of the promise; and so it was held in the case of *Jackson and Pigot*. Could justice accord. And judgment was entred for the plaintiff.

Note; *Holt* chief justice and *Northey* agreed the matters said by Sir *Bartholomew Shower* concerning the days of grace, and the manner of reckoning in such cases. *Ex relatione m^{ri} Jacob.*

Garret *vers.* Johnson.

Adtunc et ibidem refers to the last time and place mentioned.

DE B T upon the statute of 5 & 6 Will. & Mar. cap. 22. upon a clause in the said act, par. 19. by which a penalty of 5*l.* is imposed upon the owner of any hackney coach, who shall ply upon a Sunday, not being appointed by the commissioners, &c. The plaintiff declared, that the defendant being owner of a hackney coach, the seventh of April 1700. at the parish of St. Botolph's Aldgate in London, drove his coach upon the seventh day of April 1700. *existentem diem dominicum, contra formam statuti* made at Westminster the seventh of November the fifth of this King and of the late Queen, *adtunc et ibidem non existens appunctuatus* by the commissioners. Upon *nil debet* pleaded, verdict for the plaintiff. And upon motion in arrest of judgment made by Mr. Branthwaite, and opposed by Sir Bartholomew Shower, the judgment was arrested; because the *adtunc et ibidem* must refer to the last time and place mentioned, which is the time and place of the making of the act; and therefore the plaintiff has confined the appointment of the commissioners to the said time and place: but it may be, the defendant was appointed at another time and place, and then this action will not lie; and therefore the declaration should have said, *non existens appunctuatus, &c.* generally, or *non existens appunctuatus, &c.* the seventh of April 1700; for though upon evidence another time or place may be given in evidence, yet upon the face of the declaration the plaintiff ought to make himself a good title to the action. *Ex relatione m'ri Jacob.*

Clay *vers.* Snelgrave.

S. C. 1 Salk. 33.
Carth. 518.
Master of a ship cannot sue in the admiralty for his wages.
12 Mod. 406.
Post. 805, 983.
6 Mod. 76.
Comb. 135.

THE defendant as executrix to the master of a ship libelled in the admiralty court for the wages owing to the testator by the owner. Upon which the plaintiff to have a prohibition suggested the statute of 15 Ric. 2. cap. 3. that the admiralty court shall not have consueance of contracts made upon the land, and shews this contract to have been made upon the land, &c. And this case was several times moved by Sir Bartholomew Shower and Mr. Acherley for the prohibition, as well in Michaelmas, Hilary, and Easter terms last past, as in the present term; and it was opposed by Mr. Northey and Mr. Hall. And the council for the prohibition argued, that prohibitions are grantable *de jure*, and are not discretionary in the court. Raym. 3, 4. That the case in Winchb Rep. 8. was the first case, where a prohibition was denied in case of a suit by mariners for their wages in the admiralty court, and the

the denial was grounded upon compassionate reasons, because they were poor men, and because there they might join in action, but here they must sever; but the said case is contrary to the reason and grounds of the law, for where the contract is made upon the land, though the service was done upon the sea, it is out of the jurisdiction of the admiralty; and so *vice versa*, if the service was done upon the land, and the contract upon the sea. 12 Co. 79, 80. *Staunf.* 51. b. *Hob.* 212. A consultation is always denied in case of a suit by mariners, if there is a charter-party. And the sealing of a writing cannot make any difference in reason. *Raym.* 3. a prohibition granted where the master libelled alone. Mr. Northey and Mr. Hall *e contra* for the defendant said, that the case of mariners was now settled, and ought not to be stirred; but that the great reason why they are permitted to sue there is, the ship is the debtor, and by the law of the admiralty they may attach her, which they cannot do by the common law; and in the admiralty court they may all join in suit, whereas by the common law they must bring several actions. That the case of the master is not different, for the ship is security to him, and he is but a mariner, and his wages are wages at sea. But however, where the master dies in the voyage, as he did in this case, there can be no reason to exclude his executors from suing in the admiralty, because he had no opportunity of bringing his wages to account with the owners. And in 2 *Ventr.* 181. *Allison v. Marsh*, the purser, though an officer of the ship, was allowed to sue for his wages in the admiralty. And in 2 *Keb.* 779. pl. 6. *Rex v. Pike*, a prohibition was denied, where the master and mariners joined in a suit in the admiralty for their wages. [But *Holt* said, that a prohibition ought to have been granted *quoad* in the said case.] And he cited a case *Hil.* 27 & 28 *Car.* 2. C. B. between *Cooker* and *Older*, where *Atkins* and *Ellis* justices were of opinion, that a prohibition ought to be granted to the suit in the admiralty court by the master of a ship for his wages; but *North* chief justice, and *Wyndham* justice, held the contrary opinion. But *Holt* chief justice said, that it is an indulgence, that the courts at *Westminster* permit mariners to sue for their wages in the admiralty court, because they may all join in suit; and it is grounded upon the principle, *quod communis error facit jus*; but they will not extend it to the master of the ship, especially if he was master at the beginning of the voyage here in *England*, and the contract was made with him here. Possibly if the master of a ship died in the voyage, and another man took upon him the charge of the ship upon the sea, such case might be different. As in the case of *Grosfwick v. Louthly*, where it was held in this court lately, that if a ship was hypothecated, and money borrowed upon her, at *Amsterdam* upon the voyage, he who lent the money may sue in the admiralty for it; and this court granted a consultation

Grosfwick v. Louthly. Before 152. Ship hypothecated.

*See acc. Depl.
Rep. 97.*

in the said case. But in another case, where the money was borrowed upon the ship before the voyage, the King's Bench granted a prohibition, and the parties acquiesced under it. There are many precedents in the court of admiralty, of suits by the mariners for their wages, but none for the master of the ship. And the cases differ; for the mariners contract upon the credit of the ship, and the master upon the credit of the owners of the ship, of whom generally he is one. The opinion of lord *Hobart*, that where there is matter of property to be tried, a prohibition shall be granted is a little too hard. *Gould* justice agreed with *Holt*, and said, he was of opinion, that prohibitions were grantable of right, though it had been controverted in his time. To which *Holt* chief justice said, that *Hale* chief justice and *Wyndham* justice held prohibitions to be discretionary in all cases; but *Kelynge* chief justice was of the contrary opinion. And he said, he did not esteem them to be matter of right. Then Mr. *Northey* moved, that the court would compel the plaintiff to put in bail to the action to be brought for the wages at common law, or otherwise deny the prohibition; which he said had been done often. *Holt* chief justice confessed, that the court had sometimes interposed, and procured bail to be given; but it was by consent, and in case of the proprietor himself. But in regard that in this case the plaintiff was a purchaser without notice, there was no reason. And a prohibition was granted.

David Jones *vers.* Stone.

S. C. 2 Salk.
550.

A man may sue a vicar in the spiritual court, for not saying divine service; to do which he is bound by prescription, the prescription not being denied.

Farr. 88.

6 Mod. 230.

F. N. B. 51.
B.

THE defendant libelled against the plaintiff, vicar of N. for that, that whereas by custom time whereof, &c. he was obliged by himself, or some other person, to say divine service in the chapel of *Chalbury*, for which he received such a recompense; nevertheless, he had neglected to do it, &c. The plaintiff, to have a prohibition, suggests, that all customs and prescriptions are triable by the common law; but does not deny, nor traverse, the custom. And Mr. *Harcourt* for the plaintiff argued, that the vicar is not compellable of common right to say divine service in any place but in the mother church; and therefore this being a custom, to charge the vicar against common right, it ought to be tried at common law. If in fact such a custom be found, the King's Bench will grant a consultation.

Holt chief justice said, that he was not of opinion, that this being a duty incumbent upon the plaintiff by prescription barely of itself is sufficient ground for a prohibition, especially since the prescription is not traversed in the suggestion; for it is an ecclesiastical right,

right, to bind an ecclesiastical person, to do an ecclesiastical duty : and if the ecclesiastical duty be neglected, the person who is guilty of the neglect, may be sued for it in the spiritual court, though the duty began by custom. And it is the very point of *William's* case, 5 Co. 72. b. 73. a. b. where the vicar of *Alderbury* was obliged upon a custom, to celebrate divine service, by himself or some other person, in the chapel of *St. John* within the manor of *Woollaston*, for the lord of the manor and his tenants; and the lord brought case against the vicar for negligence in celebrating divine service in his chapel for such a time; and it was held, that it would not lie, but that the remedy was, to sue the vicar in the court *Christian*, because ecclesiastical persons are more subject to the said courts, than lay men are. If this was a prescription to affect lay men, perhaps it might have another consideration; but it is a mere ecclesiastical duty, and might have a legal commencement by the consent of all parties, as by composition. If the vicar for a sum of money undertook to do divine service, and an act was made in the ecclesiastical court by the consent of all parties; that would have bound the vicar and his successors before the 1 *Eliz. cap. 2.* And therefore because it may have commenced by an ecclesiastical act, the defendant may have his remedy for the neglect in the court *Christian*. And it is upon the said reason, that notwithstanding the opinion of *Coke 2 Inst. 491.* where a suit was in the ecclesiastical court against a parson, &c. for a pension by prescription, no prohibition is grantable, though the prescription was denied. See 1 *Ventr.* 3, 120, 265. Pensions.

Gould justice agreed, and said that he would cite a stronger case, *W. Jones 230. Halsey v. Halsey*, where a prescription was alleged for a way to carry his tithes through a close called *S.* and for stopping of it the defendant libelled against the plaintiff in the ecclesiastical court; whereas in fact the way by prescription was through a close called *W.* and for that, that prescriptions for ways ought to be tried at common law, &c. and upon demurrer to the declaration, a consultation was awarded by the opinion of the whole court. So a parson may sue for a *modus* in the spiritual court. *Holt* chief justice said, that if the case in *Jones* had now come in judgment in this court, it would be questionable, because it charges the freehold of another man. The case of a *modus* is, as *Gould* justice says, if the *modus* is admitted; but if the defendant says that it is less, and insists upon it, it must be tried at common law. The rule made to shew cause why a prohibition should not be granted was discharged. *Ex relatione m'ri Jacob.*

Rex

Rex vers. inhabitantes

in Glamorganshire.

*l. l. 1. sub. 146.
Com. 90. 12. Med. 403.*

*Certiorari
lies, to re-
move in B. R.
orders made
for repairing
of Caerdiff
bridge upon
23 Eliz. c. 11.
Vide Shaw's
Parish Law,
cap. 60.*

Orders were made by the justices of peace, for levying money, for repairing *Caerdiff bridge*, by virtue of the 23 *Eliz. cap.* 11. And it was objected by Mr. Earle and Mr. Lechmere, that this court cannot in this case grant a *certiorari*; because it was a new jurisdiction erected by a new act of parliament, the trust of the execution of which is reposed in the justices, and this court has nothing to intermeddle with it; for if they proceed according to the statute, then there is no reason to remove their orders; but if not, then what they do is *coram non judice*, and void. And the parties may examine the legality of their proceedings in an action; and so it was held in a case of decrees made by commissioners upon the act for the fens, 1 *Sid.* 296. *Ball v. Partridge.* *Hardr.* 480. *Terry v. Huntington.* *Cro. Car.* 394. *Nichols v. Walker.* And no *certiorari* lies to remove orders made by commissioners of bankrupts. *Sed non allocatur.* For this court will examine the proceedings of all jurisdictions erected by act of parliament. And if they under pretense of such act proceed to encroach jurisdiction to themselves greater than the act warrants; this court will send a *certiorari* to them, to have their proceedings returned here; to the end that this court may see, that they keep themselves within their jurisdiction; and if they exceed it, to restrain them. And the examination of such matters is more proper for this court. As in the case in question; whether the act of Queen *Elizabeth* impowers the justices, to raise money, to mend wears; and to determine the doubt upon the act. As to the cases of orders made by commissioners of sewers, and of the fens, the court is cautious in granting *certioraris*; and first they make inquiry into the nature of the fact, and what will be the consequence of granting the writ; because the country may be drowned in the mean time, whilst the commissioners are suspended by the *certiorari*. But that is only a discretionary execution of the power of the court. And as to the commissioners of bankrupts he said, that they had only an authority, and not a jurisdiction. And he said, that where the justices make orders by virtue of a private act, they ought to return the act with their orders. Then it was objected, that this court cannot send a *certiorari* to the justices of peace in *Wales*; but their orders ought first to be examined in the great sessions, and from thence to be removed hither; because this court has equal jurisdiction over *Wales*, as they have over the King's Bench in *Ireland*; and therefore that a *certiorari* ought not to be granted to the justices there *per saltum*, no more than error will lie

lie in parliaments upon a judgment of the Common Pleas, leaping over this court of King's Bench.

But *Holt* chief justice said, that this matter ought not to be disputed, it being the constant practice to grant *certiorari* into *Wales*, *Certiorari lies into Wales.* as also into the counties palatine of *Durham* and *Lancaster*, which yet had original jurisdiction, and the same courts among themselves. And if the law were otherwise, the great sessions were held so seldom, that a man might be ruined, before a great sessions met.

Then exception was taken to the orders, that the money ordered to be levied was for repairing the wears, to do which they had no jurisdiction, but only to raise money for the repair of the bridge; and their authority being special, they ought to confine themselves within it. But *Holt* chief justice held, that in regard that at the time of the making of the act, these wears were built as necessary to support the bridge, by virtue of the powers given by the act of the Queen for rebuilding of the bridge, and were esteemed so then and ever since, this court will esteem them accordingly still; and therefore consequential to the power for rebuilding and repairing of the bridge, and especially when they are averred to be so in the orders. And *Gould* and *Turton* justices agreed. These orders were argued, as is usual in the case of orders made by commissioners of sewers, and returns of *habeas corpus* out of *London*, before they were filed. And a *procedendo* was awarded by the court. *Ex relatione m'ri Jacob.* Jurisdiction.

Rex *vers.* Chandler.

THE defendant was convicted for deer-stealing by a justice of peace upon 3 & 4 Will. & Mar. cap. 10. and the conviction was removed into this court by *certiorari*. And several exceptions were taken at several days, and argued. And after it had depended several terms, this term the court over-ruled the exceptions, and held the conviction good. *Holt* pronouncing the opinion of the court, said, that the case did not deserve to be argued. He said, that in these convictions by justices of peace in a summary way, where the antient course of proceeding by indictment and trial by jury is dispensed with, the court may more easily dispense with forms; and it is sufficient for the justices, in the description of the offense, to pursue the words of the statute; and they are not confined to the legal forms requisite in indictments for offenses by the common law. For though all acts, which subject men to new and other trials, than those by which they ought to be

S. C. Salk.
378.
Carth. 501,
508.
5 Mod. 446.
3 Danv. Abr.
305. p. 6.
See Stat. 5
Geo. 1. cap.
15. & 28. &
Stat. 9 Geo.
1. c. 22.
Ante 545.
Post. 583.

Between 1
July and 10
September
killed ten
deer.

be tried by the common law, being contrary to the rights and liberties of *Englishmen*, as they were settled by *Magna Charta*, ought to be taken strictly; yet when such a statute is made, one ought to pursue the intent of the makers, and expound it in so reasonable a manner, as that it may be executed. But it is also incumbent upon judges, to take great care, that in the execution of this law they do not go beyond the act of parliament. As to the first exception, that it is said, that the defendant between the first of *July* and the tenth of *September* killed ten deer, without shewing the particular days upon which they were killed, and so general and uncertain a declaration of an offense is very severe, because it drives the defendant to give an account of all his life, which he cannot possibly be prepared to do. There is an indictment in *West's prec.* 110. b. &c. for killing a buck, and there not only the day, but also the hour, is shewn. And these convictions, to which a man cannot have answer, ought to be as certain as indictments, to which a man may plead. But to this exception the council of the other side answered, that the days were not material to be proved; for evidence may be given of the facts of any other days, and therefore the omission of shewing them will not vitiate; and all that is necessary to be laid in point of time is, that the prosecution appear to have been made within a year after the fact committed; that the omission of the days is not any inconvenience to the defendant, because if he can shew an authority for killing so many as are charged upon him in the same time, it will drive the prosecutor to prove more; and if he be charged another time, he may aver, that those for the killing of which he has been convicted are the same. And the case of *Farrow v. Chevalier* was cited to this purpose, [See it before, 478.] where the same exception was taken in arrest of judgment, and over-ruled. And many precedents were cited, to warrant this manner of shewing several facts in informations upon penal statutes. *Rast. entr.* 410. *Hearn. plead.* 549. *Winch* 541, 547. *Thoms. entr.* 91, 92. *Brown. form. plac.* 1 par. 250, 1, 2, 4, 7, 9, 260. *Vid.* 186. *Co. Entr.* 158.

Holt chief justice, that in the case of *Farrow v. Chevalier* there is but one breach of covenant, and the selling there several times was only in aggravation of damages, but the damages ought to be intire. This case differs from all cases of indictments and informations for offenses at common law. All that is necessary in these cases of new offenses made by new statutes and in new summary methods of conviction by them, is to shew such a fact as is within the description of the statute, and to describe it as the statute wills.

One fact intended after another.

2. A second exception was, that the conviction was, *Memorandum quod octavo die Maii* the tenth of this King *apud Enfield in comitatu Middlesex venit coram me* *et dat mibi intelligi et informari,*

formari, quod, &c. et superinde eodem octavo die Maii anno supradicto apud domum meam in parochia sancti Andreæ Holborne in comitatu Middlesex prædicto venit prædictus et dicit, deponit et jurat

quod, &c. where it should have been *dedit*; because *dat* in the present tense relates to the time of completing the record; and it was impossible, that the informer could give information at *Enfield*, when he was at his house in *Holbourn* where the conviction was made. To which it was answered by the council of the other side, and agreed by the court; that it must be intended successively, the one after the other as the facts might be performed, and not immediately; for the justice might take the information at *Enfield*, and come afterwards to *Holbourn*, and make the conviction.

3. A third exception was, that the judgment was, *quod forisfaciat* only, whereas it ought to be, *ideo consideratum est. Sed non allocatur.* For *per curiam*, it is well enough without it. 4. Ob- Judgment
quod forisfa-
ciat.

jection. That the conviction is, that the defendant killed the deer *sine consensu domini regis proprietarii damarum prædictarum*, and not *adtunc proprietarii. Sed non allocatur.* Because it is that he killed them *sine consensu domini regis* (as before) *et adtunc et antea et postea proprietarii chaseae prædictae, aut alicujus alius personae præcipue fiduciatae, Anglice intrusted, cum custodia damarum prædictarum*; which sufficiently shews, that it was an unlawful killing.

5. Objection. That *contra pacem* is omitted in the conviction. *Sed non allocatur.* For *per Holt* chief justice, in indictments and informations one ought to conclude *contra pacem*; but in these summary convictions, there is no need to pursue so strictly the forms of law, and they are well enough without *contra pacem*. Contra pacem
omitted.

Rex vers. Speed.

EXception was taken to this conviction for deer-dealing, that the facts are laid at several distinct days, and then at the end comes *illicite occidit*; and so it did not extend to them all. But *per curiam* it is one intire sentence, and then the *illicite occidit* will extend to every one of them, as well as if it had been repeated particularly. Afterwards another exception was taken, that *illicite occidit* is not sufficient, but they ought to say *furtive*, or *cum animo furandi*, or something resembling it, for every unlawful killing is not within the act. But *per Holt* chief justice, if there is a pretense of right, we ought to suppose, that the justice would do right, and acquit the defendant: because he is intrusted with the execution of the law. The intent of the act was, to prevent killing in a clandestine manner by stealth; but it is enough to lay the fact in the words of the act of parliament, and that ought to be admitted upon evidence. The title of the act is, against deer-stealers, S. C. Salk.
379.
Carth. 502.
The last words
extend to the
whole sen-
tence.
Illicite occidit.
Ante 545.
581.

stealers, but there is not any such word in the body of the act. And therefore if there was a dispute concerning the limits of a walk in a forest; and one claims as part of his walk, what is in fact part of the division of another, and accordingly kills deer there; the case is out of the intent of the act, but is plainly within the words. The intent of the act was, to punish rogues and vagabonds; and not to punish persons, who by mistake in the execution of their trusts exceed what the law warrants. If the keeper of a walk gives leave to a third person to kill a deer; though this licence does not give sufficient authority to the third person to kill it, yet it will not be an unlawful killing within the statute, because there is a colour of right. Another exception was, because it is not shewn how he killed. *Sed non allocatur*, because the killing or not is the material part. And *Holt* chief justice said in this case, that if a conviction was affirmed in this court, this court might award a *levari facias*; but if the defendant had no goods, he made a question, if they could imprison him. Both these convictions were affirmed. *Ex relatione m^ri Jacob.*

If a man kills deer in pursuance of a supposed right that he hath, it is not within the act.

Coment.

The King *against* the company of barber surgeons in London.

A by-law made contrary to 32 Hen. 8. cap. 42. concerning the election of the wardens of the company, ill.

IN an information against the defendant for a false return made by them to a *mandamus*, directed to them, to command them, to elect a barber to be one of the wardens of the company; to which they returned, that they had elected two barbers. Upon the trial at *nisi prius* in *Middlesex* the fitting after the last term before *Holt* chief justice upon the evidence the case appeared to be thus. That there is a custom in this and all other companies in *London*, to admit persons, who are not of the profession or trade of which the company is denominated, to be freemen of the company, indifferently with those who are; and upon this, there being two classes in this company, the one of barbers, and the other of surgeons, a dispute arose about the year 1631 under which class these foreigners should be ranged; and the company considering, that many of the foreigners were considerable men, and being unwilling to turn them out of the company, they agreed, that they should be ranked under the class of barbers; and accordingly a by-law was made, that all such persons, as should be admitted into the company, and were not barbers nor surgeons by profession, should be barbers; and accordingly it has continued ever since, and the warden for the class of barbers has been usually elected out of the reputed barbers, and the real barbers have been usually omitted; and one of the present wardens was a reputed barber. This point was reserved by *Holt* chief justice upon the trial, and he acquainted his

his brothers with it in court. And *Holt* demanded in court their opinion, and said, that he believed that it would be a hardship to the whole company, if this usage should be set aside. For then if these reputed barbers (who are commonly the most substantial men of the company) were excluded from being elected into the government of it, all such persons would decline the admitting themselves into the company. But yet the words of the 32 *Hen. 8. cap. 42.* are not to be got over. For the said act taking notice, that there were two companies, the one of barbers, the other of surgeons, unites them by the name of barber-surgeons, restrains them to their several employments, and then a clause comes and enacts, that they shall annually elect four masters or governors of the company, two of whom shall be expert in barberry, and two in surgery, to have the correction of all persons using barberry or surgery. And the act cannot be understood in other manner; for the intent of the act being to unite the persons of these two professions, every member of the company as such is a barber-surgeon; and therefore where the act comes and distinguishes them, it can be only with relation to their several professions; for in other manner they cannot be more barbers than surgeons. And it is the stronger, because it is a qualification of their offices, since they must have the correction of the practisers in the several professions. Then the usage or by-law can never repeal the act of parliament. And therefore by his opinion, and the opinion also of *Turton* and *Gould* justices, the *poslea* was ordered to be delivered to the plaintiff. And the last day of the term a peremptory *mandamus* was granted. And *Holt* chief justice said, that he believed, this mingling of companies was later than the time of *Henry VIII.* *Ex relatione m^ri Jacob.*

Clerke *vers.* Clerke.

CLERKE died intestate. His wife took out letters of administration to him. *Clerke* brother to the intestate cited the defendant into the Spiritual Court, to make distribution of the intestate's estate. The defendant there suggests, that the brother has goods of the intestate in his hands to the value of 200*l.* And upon this the Spiritual Court orders him to bring the 200*l.* into court, to the end that it might be distributed. And for not bringing it in they excommunicate him. Upon which he moves in *B. R.* for a prohibition, and it was granted as to the whole process that compelled him to bring in the 200*l.* For *per curiam* the Spiritual Court has power to make distribution of the estate, when it is come in, but not to fetch it in; because that is to hold plea of debt. But the Spiritual Court might refuse in this case to proceed

The Spiritual Court may make distribution when it comes in, but they cannot fetch it in from the debtors.

to the distribution, until the brother had brought in the 200l. but they cannot excommunicate him for not bringing it in.

Rex vers. Fowler.

S. C. 1 Salle.
350.
3 Danv. Abr.
293. p. 4.
295. p. 2.
296. p. 3, 4.

THE defendant was arrested upon an *excommunicato capiendo*. The *significavit* expressed, that he was excommunicate for contumacy in a suit *pro subtractione decimarum seu aliorum jurium ecclesiasticorum*. The defendant sued a *habeas corpus* directed to the sheriff of the county, &c. *vel custodi gaolae*, &c. and the gaoler returned the warrant of the sheriff upon the *excommunicato capiendo*, &c. Mr. Northey took exception to the return, that as it appeared upon the recital of the *significavit* in the warrant, the defendant was excommunicate in a suit for tithes or other ecclesiastical duties in the disjunctive, and therefore ill, because the cause of excommunication should appear to be sufficient, and the specialty of it ought to be shewn, and not so generally. For perhaps the *jura ecclesiastica* may be such as he was not obliged to pay. Excommunication so generally pleaded without some more special cause, will not be sufficient to stay another's suit. 8 Co. 68. b. Trollop's case, much less to deprive a man of his liberty. And the case of the King and Sanchee was cited, [see it before, 323.] where to a writ of *habeas corpus* the defendants were returned committed by warrant of two justices of peace in pursuance of 27 Hen. 8. cap. 20. for contumacy in a suit before an ecclesiastical judge for tithes or other ecclesiastical duties, just as it is here; and upon that exception the defendants were discharged. The court gave no opinion in this matter. But Holt chief justice said, that Sanchee's case differed from this case, because the commitment there was by virtue of a special authority given to the justices of peace by the said act, which ought to be pursued strictly. But the court quashed the *habeas corpus* for two reasons. 1. Because it was directed to the sheriff or gaoler in the disjunctive, which the clerks agreed, was contrary to all the course, and ill. 2. Because the writ of *excommunicato capiendo* was not returned, but only the warrant of the sheriff; for the writ ought regularly to be returned, for may be it is right; for if the sheriff has a good writ against a man, and he makes an ill warrant to his bailiffs upon it, to arrest the man, and they arrest him accordingly, though the bailiffs cannot, yet the sheriff may justify, by virtue of the writ; for if the sheriff be in any manner privy to the taking, as if he command his bailiffs to arrest a man by parol, when he is taken accordingly, he is in the custody of the sheriff: and if he has a writ against him at the same time, he is arrested, and is in custody, by virtue of the writ. Indeed the sheriff must be privy to the taking, or otherwise he cannot

A *habeas corpus* directed to the sheriff or gaoler, ill.

A writ of *excommunicato capiendo* ought to be returned.

The sheriff having a good writ makes an ill warrant, yet he may justify by the writ.

not be in his custody. And *Holt* chief justice said, that the carrying of this writ to the gaoler was an irregularity; for where a man is committed immediately to the gaoler, there the *habeas corpus* ought to be carried to him; but where he is arrested by virtue of a warrant upon a writ directed to the sheriff, there the *habeas corpus* ought to be carried to the sheriff; for he having the writ in his custody, is the only proper person to make the return. Since the *habeas corpus* act the gaolers have taken upon them to cheat the sheriffs of the money for the returns, but that is not regular. The writ was quashed, and a new *habeas corpus* granted returnable *immediate*; upon which the court gave order, that they should procure the writ to be returned. Note; That writs of *excommunicato capiendo* are inrolled in the Crown Office, which roll was brought into court in this case, and the writ appeared there to be in the disjunctive. *Ex relatione m'ri Jacob. Post. 618.*

Smith *vers.* Wallet.

THE sequestrator of the tithes of a vicarage sued the impro-
priator in the Spiritual Court for tithes upon the endow-
ment. And the defendant moved here for a prohibition upon a
suggestion, that it was not a vicarage, and that that ought to be
tried at common law. *Holt* chief justice said, that the suggestion
is good in point of law; but if the suggestion appears to the
court to be notoriously false, the King's Bench will not grant a
prohibition; for they ought to examine into the truth of the sug-
gestion, and see what foundation it hath; for if it appears plainly
to be false in fact, the King's Bench ought not to grant a prohibi-
tion. *Hob. 66. Aston v. Castle-Birmidge*; and it is held there,
that though the surmise be matter of fact, and triable by a jury,
yet it is in the discretion of the court to deny a prohibition. So it
was done *Hob. 185. Jones v. Jones*. But at last in this case a
prohibition was granted by consent, and issue to be taken, vicarage
or not, and to be tried at the next assises, to settle the right.
Note, Mr. *Bury* shewed in this case a copy of an endowment, and
of the book of first fruits, where the vicarage was rated at
and receipts for first fruits. *Ex relatione m'ri Jacob.*

S. C. 1 Salk.
58.A vicar libels
for tithes, up-
on denial of it
to be a vicar-
age a prohibi-
tion granted.No prohibi-
tion if the
suggestion is
false.*Ante 219,*
220.

Hartfort

Hartfort *vers.* Jones.

S. C. 2 Salk.
654.
Uncertainty.
Barnard. Rep.
65.

IN trover the plaintiff declared, that he was possessed *de octo habit. vestium*, *Anglice* suits of wearing apparel, seventy-two ounces of cloves, mace, and nutmegs, pounds *aromatum vocatorum* grocery ware, seventy pounds *lini diversorum generum*, &c. *et quod casualiter amisit*, &c. The defendant permits judgment to be given against him by default, and a writ of inquiry was executed, and intire damages given for the plaintiff. And Mr. Northey moved in arrest of judgment upon the uncertainty of the declaration in the several particulars there mentioned; but the chief objection was seventy-two ounces of cloves, mace, and nutmegs, and does not shew how much of every one. Mr. Carthew to maintain the action cited 2 Ventr. 67. *Blisse v. Frost* 78. *Chamberlain v. Cook*, trover de una serie cyanorum et granatorum, *Anglice* turks and garnets, after verdict held good. 1 Sid. 263. *Pledall v. the hundred of Thistleworth*, declaration of a robbery of a gorget and cuffs, good after verdict. 98. trover de plancis granariis, good. *Stile* 358. trover of a library of books, good. 1 Mod. 289. *Wood v. Davies*, de tribus struibis foeni good after verdict. 2 Saund 74. Hil. 1 Will. 3 Mar. trover de viginti peciis vini branditti, held good after verdict. Holt chief justice said the last term when this was moved, that the said cases cited by Mr. Carthew were after verdict, and if there were a verdict in the present case, the judgment would be according, for then they would intend that they were mixed; but this case is after judgment by default. There is a great difference, where the thing, for which the action is brought, is one intire aggregate body, though consisting perhaps of many different parts; there it will be good, which is the reason of the cases of the pairs, and the most part of the cases before cited. And for the said reason Trin. 23 Car. 2. B. R. *Boroughs v. Hall*, trover for a ship cum armamentis was held good; whereas if the action was brought for the guns and rigging severally, they ought to shew what and how much. And so it was held in the case of *Pollexfen v. Crispe*. The true reason why certainty is so much required is, because a recovery in this action may be pleaded in bar, if another action should be brought for the same cause. This had been ill in *detinue* without shewing that they were mixed. But why is not this declaration as certain as a declaration in ejectment for twenty acres of land, thirty of meadow, &c. in the towns A. B. and C. without shewing how much lies in each town. And afterwards this term, upon the motion of Mr. Carthew, judgment was given for the plaintiff, because they esteemed these to be things mixed. *Ex relatione m'ri Jacob.*

MR. Robert Eyre moved to quash the return of a rescue, which s. C. 2 Salk. was, *virtute brevis mihi direkli feci* a warrant to J. S. and J. N. my bailiffs, who by virtue thereof *ceperunt et arrestaverunt* the defendant, *et in custodia mea habuerunt, quousque A. & B. rescusserunt* the defendant *ex custodia J. S. et J. N. ballivorum meorum*. And it was quashed. For per Holt chief justice, the sheriff should either have returned, that the defendant was in his custody and rescued out of his custody, or that he was in custody of the bailiffs and rescued out of their custody, either of which returns had been good. But this return is repugnant, viz. that the defendant was in custody of the sheriff, and rescued out of the custody of the bailiffs. *Ex relatione m'ri Jacob.* 2 Roll. Abr. 457. pl. 5. Wilcox's case.

Return of a rescue of a man in custody of the sheriff out of the custody of the bailiffs.

1 Show. 180.

Lutw. 130.

6 Mod. 211.

3 Mod. 114.

115.

Rock vers. Layton.

IN case against the sheriff for a false return of a *devastavit* to s. C. 1 Salk. a writ of *feri facias*, the case upon the evidence at the trial appeared to be thus. An administratrix had assets to the value of 200l. She confessed judgment in an action brought against her for 300l. and afterwards permitted judgment to be given against her by default in another action; and upon a *feri facias* upon the last judgment the sheriff returned *devastavit*; and whether this was a false return or not was the question. And Mr. Montague for the plaintiff argued, that judgment being in this case against the administratrix by default, she shall not be estopped to give the former judgment in evidence, upon the issue of *devastavit* or not upon the *scire fieri* inquiry; this case resembling the case of two *nichils* to a *scire facias*, there one may have an *audita querela*, otherwise where the defendant is returned warned. And the reason why the award of execution was reversed in Pettifer's case 5 Co. 32. was, because two *nichils* were returned upon the *scire facias*. But in the like case between Mounson and Bourne, Cro. Car. 526. a *scire feci* being returned, the award of execution was affirmed. So here the judgment being against the plaintiff by default, so that she had no opportunity to plead the former judgment, she is not estopped to take advantage of it, and consequently the return of the *devastavit* is a false return. 2. If the permitting of judgment to be given against the plaintiff by default will amount to a confession of assets, yet it will not confess a *devastavit* and conversion. 3. The sheriff ought not to have returned the *devastavit* upon the *feri facias* without a *scire fieri* and inquiry. Mr. Northey *e contra* for the defendant argued, that as to the return of the *devastavit* upon the

310.

3 Danv. Ab.

400. p. 3.

S. C. Comyns

87.

Executor has goods to the value of 200l. and confesses a judgment against him for 300l. then he permits judgment to go by default against him for 200l. then he pays the first judgment, this will be a *devastavit* to the second judgment.

feri facias, &c. the sheriff may return it upon the *feri facias*, if he will at his peril. Then as to the confession of assets he said, that he did not believe, that the permitting judgment to be given by default is a confession of assets; but that she has made herself chargeable for all the assets, which she at any time had; and if she will not discharge herself by pleading, she has no other means to discharge herself, but must answer for the whole. For where a man has a day to plead a matter before judgment, and omits his advantage, he cannot take advantage of it afterwards. And for this reason if an executor has two actions brought against him for 100*l.* each, and has but 100*l.* assets; if he does not confess the one and plead it to the other he shall pay the 200*l.*

The sheriff may return a *devastavit* upon a *feri facias*.

Judgment against tenant in tail, he dies, lands descend to the issue, judgment against him upon default estops to say that he was tenant in tail.

Holt chief justice. The sheriff may return a *devastavit* upon the *feri facias* if he will, and upon such return judgment shall be given against the administrator *de bonis propriis*. The case is, such administratrix hath assets, and first confesses judgment to the value of her assets, then permits another judgment to be given against her by default; instead of which if she had pleaded the first judgment, and no assets over, it had been a good bar of the plaintiff's action; the question is here, whether after this neglect of pleading this matter, she can at any time take advantage of it afterwards. It is the common case, that where a man has matter of bar to plead, and he slips his opportunity of pleading it, he loses the benefit of it for ever. To which purpose is the case of *Gilburn v. Rack*, 2 Sid. 12. mentions it; but he said, that he had a very exact report of it; where judgment of debt was given against tenant in tail, the lands intailed descend to the issue in tail, then a *scire facias* is sued against his heir and terretenant, and the heir in tail was returned heir in fee, and terretenant, and warned; and he not appearing, there was judgment *quod habeat executionem* by default, and an *elegit* issued; and the intailed lands were extended, and the plaintiff upon the extent brought ejectment, and the defendant offered to give in evidence that the lands were intailed upon him; but it was held, that he was estopped to give that in evidence, because a *scire feci* was returned, and he might have pleaded it; which is a strong case, all the special matter being found by the jury. And the case of *Hannor v. Mase*, Hob. 283. is grounded upon the same reason. And it is reasonable, for if the defendant had pleaded this matter, it may be the plaintiff would have acquiesced; but if this should be allowed, it would compel a man to proceed *nolens volens*. On the other hand the consequence of the present resolution will be an advantage to all creditors, in compelling executors to be honest and shew the truth of their case. As to the matter of the judgment being by default, it is agreeable to all the cases cited; for no judgment can be in a personal action without appearance, and consequently the defendant

defendant had opportunity to plead. The reason of the reversal of *Pettifer's* case was, because at that time such practice had not gained allowance; and it was thought hard, to introduce it, because it took away the plaintiff's remedy against the sheriff. But afterwards when it came to be a question in the case of *Mounson v. Bourn*, the judges took notice that it was the constant course of the Common Pleas, and approved it, and gave directions that it should be used in this court by those that would. The judgment against an executor by default is not conditional, but is the same that is given in all other cases; as if upon *plene administravit* pleaded the jury had found assets, yet the judgment must be *de bonis testatoris*, though the defendant is estopped by the verdict, to say that there is no goods of the testator. And the reason is, because the sheriff upon the *fieri facias* has no power to seize the proper goods of the executor until a *devastavit* returned; which the sheriff of necessity must return, because the defendant is estopped by the verdict, to say that he has no assets. As to the concession by Mr. *Northey*, that though an executor permits judgment to be given by default, that will not amount to a confession of assets, it is not so clear; for why does he permit judgment to go by default? though possibly it may be taken in favour of executors. *Gould* justice said, that it's being a judgment by default is not material in the case, for it had been the same if she had pleaded *plene administravit*; for he would allow her to give every thing in evidence upon *non devastavit* upon the *scire fieri* inquiry, that she might have given in evidence upon *plene administravit*; but the former judgment could not have been given in evidence upon it, for by the neglect of the administratrix in pleading the former judgment, the assets are become assets throughout; and therefore if there is any defect of assets, to satisfy the second judgment, it is a *devastavit*. *Holt* chief justice would not over-rule that point at the assizes, but permitted it to be argued and determined here, because it was a point of great consequence. The verdict, which was given for the plaintiff, was set aside, and a rule of court made, that the defendant should have his costs. *Ex relatione m^{ri} Jacob.*

A man may give in evidence any thing upon the *scire fieri* inquiry, that he might have given in evidence upon *plene administravit*.

Wilbraham *vers.* Dooley.

MR. *Ackerley* moved the King's Bench to stop a writ of error s. C. 2 Salk. out of Chancery for reversing an outlawry in the county palatine of *Chester*, founding himself upon 4 *Inst.* 214. where *Coke* holds, that in a writ of error to *Chester* day should be given for so long time as that three counties might be held before the return of the writ in the King's Bench, which is four months; by which time the justices or lieutenants within the same county might redress

500.
 Comb. 345.
 Post. 605.
 Proceedings upon error to reverse an outlawry in *Chester*.

No outlawry
in Chester be-
fore 33 H. 8.
cap. 13.

dress the error, if they would. *Northey contra* said, that though there was such an ancient usage, yet now the statute of 32 Hen. 8. cap. 43. has taken away the ancient course, and enacted, that the administration of justice used heretofore to be had at eight shire days, should be thereafter executed by the justice of Chester at two times in the year only, at the sessions next after Easter, and at the other sessions next after Michaelmas, (which by 33 Hen. 8. cap. 13. is made moveable at the pleasure of the justice, so as proclamation be made of the time fifteen days before) in like manner as is used in the county palatine of Lancaster. And by that statute it is made impracticable in point of time; for if it should be executed now, it would delay the party at least two years, instead of the four months delay before. 2. This custom, if it now remained, extends only to cases of judgments given by the judges *ratione tenuræ*, to save their fine; and therefore it does not extend to a fine, nor consequently to this case, because the judgment *quod utlagetur* is given by the coroners. 3. Before 33 Hen. 8. cap. 13. there were no outlawries in Chester, the electing of coroners in the same county being first appointed by the said statute; and therefore the custom could not extend to judgments of outlawry. *Holt* chief justice agreed *in omnibus*, and said, that there was no colour for the motion; and said farther, that there was no chief justice of Chester before the time of Queen Elizabeth, there being but one justice before. See the account of this custom at large in *Dier* 345, 320, 1. from whence *Coke* transcribes it, in 4 *Inst.* 212. *Ex relatione m'ri Jacob.*

Rex *vers.* Browne.

S. C. 1 Salk.
376.

*Separalia in-
dictamenta
huius schedulae
annexa sunt
billae verae.*

SIR Bartholomew Shower moved to quash an indictment, because the caption was, *Ad generalem, &c. per sacramentum* of the jury *praesentatum existit, quod separalia indictamenta huius schedulae annexa sunt billae verae*; to which he took two exceptions. 1. That there was no finding; for if there were twenty indictments annexed to the schedule, and two of them only were true, and the others false, that would answer the finding. 2. That they were not indictments, until they were found. As to the first, the opinion of the court was, that it was well enough, *separalia indictamenta* importing all the several indictments. But for the second exception it was quashed, because it ought to have been *billae*.

Medina

Medina *vers.* Stoughton.

CASE. The plaintiff declared, that the defendant being possessed of certain million lottery tickets, sold them to the plaintiff, affirming them to be his own, whereas in truth they were the tickets of another man. The defendant pleaded, that he bought them *bona fide* before the sale, and so sold them *bona fide*; *in quo casu* the plaintiff ought not to have his action, *et petit judicium de narratione, et quod narratio cassetur*. The plaintiff demurred. *Holt* chief justice: The plea is ill, and the action well lies. Where a man is in possession of a thing, which is a colour of title, an action will lie upon a bare affirmation that the goods sold are his own. For in such case it amounts to a warranty, and so it was adjudged in this court *Mich. 1 Will. & Mar. B. R.* between *Cross* and *Gardiner*, 3 *Mod.* 261. where in case the plaintiff declared, that there being a discourse between the plaintiff and defendant concerning the sale of two bullocks then in the possession of the defendant, the defendant sold them to the plaintiff, falsely affirming them to be his own, *ubi revera* they were the bullocks of *J. S.* and upon this reason it was adjudged for the plaintiff, after motion in arrest of judgment, according to 2 *Cro.* 196. *Rosewell v. Vaughan*; but otherwise in case of land, because there the purchaser may search into the title. And *Gould* justice, that he drew the declaration in the case of *Cross v. Gardiner*, and purposely shewed a possession of the bullocks, for the queries turned upon that difference. But the great question of this case was, whether they should give final judgment, or only *respondes ouster*? Mr. *Northey* said, that *petit judicium de narratione* is always in bar in this court; in abatement it is *petit judicium de billa, et quod billa cassetur*; and judgment *quod billa cassetur* cannot be given in this case, because it is not prayed. *Holt* chief justice: That is true in demurrers, but not in pleas, because there it is *actio non*; for a man may plead in abatement of the declaration. *Gould* justice: Where a matter of bar is pleaded in abatement, the plaintiff shall have judgment in chief. The matter of this plea is plainly in bar, being new matter out of the declaration; and the defendant says, *in quo casu* the plaintiff ought not to have his action, which is in bar. *Holt* chief justice: If a man pleads matter which goes in bar, but begins and concludes his plea in abatement, it will be a plea in abatement; for it is the beginning and conclusion that make the plea. See 1 *Sid.* 189, 190. But if he begins in bar, though he concludes in abatement; or concludes in bar, though he begins in abatement; it will be a plea in bar. *Gould* justice: In the demurrer the plaintiff prays his damages; which is ill. *Holt* chief justice: It was held

S. C. 1 Salk. 210.

Case for selling goods and affirming them to be his own, where they were not.

Show. 68.

Cro. El. 44.

1 Ro. Rep.

275.

1 Ro. Ab. 91.

Sid. 146.

Sty. 343, 348.

2 Cro. 474.

Mo. 196.

Carth. 187.

Petit judicium de narratione is a plea in bar in B. R.

Ante 339.
191.
Fyl.

Gill. Hist.
C. B. 44.

Show. 4.
Judgment in
abatement
where it ought
to be in bar
against the
defendant,
cannot be af-
signed by him
as error.

Roofier v.
Sawkins,
Holt 460.

in this court in the case of *Bisse v. Harcourt* [See 3 Mod. 281.] that if the defendant pleads matter of fact in abatement, which the plaintiff confesses and avoids, there in the conclusion of his plea he cannot pray damages, but must affirm his writ; but if he denies the fact, he may pray judgment *de damnis*; because if the matter of fact be found for the plaintiff, he shall have final judgment. And in another case afterwards upon a *scire facias* they held, that if the defendant pleads matter of fact in abatement, and the plaintiff replies and denies the fact, he may pray execution; but yet if judgment be given for the plaintiff upon demurrer to the replication, it should be only *respondes ouster*. The court gave judgment in this case, *quod respondeat ulterius*, because they said that would not be mischievous; for if it were error the defendant could not assign it, it being in his favour. And in another case last term, between *Roofier* and *Sawkins*, *Holt* chief justice held, that if a plea in bar be pleaded, and the court gives judgment only to answer over, it cannot be assigned for error, because it is for the defendant's benefit; as if the court grants an *esso*, where none lies by law. *Ex relatione m'ri Jacob.*

Sir Creswell Levinz *vers.* Randolph.

S. C. Cafes
B. R. 413.
S. C. 12 Mod.
414.

Debt upon a
bond given by
a member of
Gray's Inn
for the be-
nefit of the
society upon
his admission.

General
performance
pleaded.

DEBT upon a bond of 40*l.* brought by Mr. serjeant *Levinz*, as late treasurer of *Gray's inn*, against the defendant, a counsellor at law and member of the same society. The defendant cravesoyer of the bond and condition, which was, that if the above bounden *Herbert Randolph* shall from time to time, and at all times hereafter, well and truly pay, or cause to be paid, all such sum and sums of money as shall become due by him for commons, vacations, pensions, dues and duties whatsoever, belonging unto *Gray's Inn*, and shall observe all such order and orders of pensions as shall be made from time to time, and at all times hereafter, in *Gray's Inn* aforesaid, that then, &c. Upon which the defendant pleaded, that he *a tempore confectionis scripti praedicti usque diem exhibitionis billae praedictae bene et fideliter solvit omnes denariorum summas et observavit omnes ordines in conditione praedicta specificatos mentionatos et contentos ex parte sua solvendos et observandos secundum formam et effectum ejusdem conditionis, viz. apud parochiam sancti Andreae Holborn praedictam in comitatu praedicto. Et hoc, &c.*

Et praedictus Creswell dicit, quod ipse per aliqua per praedictum Herbertum superius placitando allegata ab actione sua praedicta inde versus eum habenda praeccludi non debet, quia protestando quod praedictus Herbertus non solvit aliquas denariorum summas nec observavit aliquos ordines in conditione praedicta specificatos ex parte sua solvendos

vendos et observandos secundum formam et effectum ejusdem conditionis, pro placito idem Creswell dicit quod praedictum hospitium Graiense, communiter nuncupatum Gray's Inn, in praedicta parochia sancti Andreae Holborn in comitatu praedicto est et a tempore diu et longinquo praeterito fuit antiquum hospitium curiale et antiqua laudabilis et honorabilis societas generosorum leges hujus regni Angliae studentium, vocatum an inn of court, necnon unum de quatuor societatibus et hospitibus curialibus, vocatis inns of court, hujus regni Angliae de et in quibus aut aliquibus vel uno illorum quatuor hospitiorum et societatum omnes et singuli generosi et personae leges Angliae studentes ad barram et in consiliarios ad legem evocandi proficiendi et allocandi admissi educati et approbati sunt et per totum tempus praedictum fuerunt et esse consueverunt priusquam sic ad barram evocantur seu consiliarii ad legem profecti et allocati sunt fuerunt vel esse potuerunt, in quo quidem hospitio et societate Graiensi sunt et a toto tempore praedicto fuerunt separales gradus generosorum societatis illius et inter alios unus et principalis gradus qui ex lectoribus, Anglice readers, et eorum assistentibus consistit, qui quidem lectores et assistentes sunt et nominantur socii de banco, Anglice benchers, hospitii sive societatis Graiensis, ac hujusmodi socii de banco pro tempore existentes sunt et per totum tempus praedictum fuerunt gubernatores et regulatores societatis et hospitii illius, curam habentes inter alia examinandi ad barram evocandi et in consiliarios ad legem proficiendi et allocandi studentes et membra dictae societatis, unus quorum quidem sociorum de banco per et inter seipsos de tempore in tempus electus adinde nominatus est et fuit thesaurarius hospitii de Gray's Inn praedicti, et nomen et officium illud per duos annos insimul usualiter aut eo circiter habet exercet gaudet et occupat et habere exercere gaudere et occupare solet et solebat a toto tempore supradicto, qui quidem thesaurarius pro tempore existens inter alia tanquam ad ejus officium spectantia capiat et cepit ac per totum tempus praedictum capere consuevit ibidem de et a quolibet ad barram evocato et in consiliarium ad legem profecto et allocato per socios de banco dictae societatis aut hospitii Graiensis hujusmodi scriptum obligatorium cum hujusmodi conditione superius specificata ad et super hujusmodi ejus evocationem ad barram ibidem, et quilibet sic ad barram evocatus necnon quilibet in eandem societatem admissus (dum unus membrorum ejusdem extitit) solvit et a toto tempore supradicto solvere consuevit hujusmodi thesaurario pro tempore existenti in usum dictae societatis quandam parvam denariorum summam, scilicet tres solidos et quatuor denarios, annuatim nomine pensionum suarum, Anglice his pensions, viz. duodecim denarios quolibet termino sancti Michaelis et duodecim denarios quolibet termino sancti Hilarii ac unum solidum et quatuor denarios pro termino Paschae et termino sancti Trinitatis, erga sustentationem publicorum et necessariorum onerum expensarum et custagiorum societatis praedictae, scilicet apud hospitium Graiense praedictum in parochia praedicta; Et
idem

idem Creswell ulterius dicit, quod tempore confessionis scripti praedicti ipsemet fuit unus sociorum de banco societatis illius ac thesaurarius dicti hospitii Graiensis prius adinde debito modo electus, viz. apud hospitium illud in eadem parochia, quodque praedictus Herbertus (tunc et antea unus generosorum et membrorum ejusdem societatis existens) adtunc et ibidem per socios de banco societatis et hospitii illius ad barram evocatus et unus consiliarius ad legem profectus et allocatus fuit juxta laudabilem morem inde a toto tempore supradicto ibidem usitatum, et superinde dictum scriptum obligatorium cum conditione praedicta in forma praedicta eidem Creswell adtunc et ibidem fecit, et unus membrorum societatis illius ibidem adhuc existit, quodque ultimo die termini sanctae Trinitatis anno regni domini Gulielmi tertii nunc regis Angliae, &c. nono (quodam Daniele Bedingfield armigero adtunc et antea et postea thesaurario societatis et hospitii Graiensis praedicti existente) summa trium solidorum et quatuor denariorum pro pensionibus ipsius Herberti dicto hospitio spectans pro uno anno integro adtunc finito aretro fuit et adhuc existit insoluta contra formam et effectum conditionis praedictae; Et hoc paratus est verificare, Unde petit judicium et debitum suum praedictum unacum damnis suis occasione detentionis debiti illius sibi adjudicari, &c. W. Dixon, L. Agar. To which replication the defendant demurred, and shewed for cause, quod per placitum praedictum non constat quod ipse idem Herbertus conditionem scripti obligatorii praedicti aliquo modo infregit, quodque est incertum et caret forma, &c. Geo. Barret. And the plaintiff joined in demurrer.

Condition of a bond to pay such sums as shall be due, no demand is necessary. Mr. Mountague for the defendant took two exceptions to the replication. 1. That in the assignment of the breach no demand was alleged, which ought to be, because it was an uncertain payment. 2. The breach is not positively alleged, for it may be the defendant paid his pensions to the treasurer, and the treasurer did not pay them to the society, and then they will be arrear to the society, and yet not due from the defendant. *Sed non allocatur.* For *per Holt* chief justice no demand is necessary for this sum, being a sum in gross. And *per Gould* justice, the defendant here after pleading general performance, is estopped to say, that there was no demand. To which *Holt* chief justice agreed. *Cro. Car. 76. Chapman v. Chapman.* 2. The alledging that so much was in arrear for pensions from the defendant is a sufficient breach; for if they had been paid to the treasurer, that had been payment to the society, and so they had not been in arrear. But it had been better pleading, to have said, that the defendant had not paid, &c. And judgment was given for the plaintiff *nisi*, &c.

Departure.

Afterwards Mr. Cowper shewed cause, why judgment ought not to be given for the plaintiff (*Holt absente*) Turton and Gould justices

justices being only in court. And he said, that it did not appear by this pleading, that the pensions were due within the condition of the bond, for it is only, that every one *solvit et solvere consuevit*, which is no prescription, and therefore cannot make a due; and it is not said *solvere consuevit et debuit*. But the two judges were of opinion, that these pensions appeared to be due upon the record. And therefore judgment for the plaintiff. Note, *Nortbey* took exception, that their plea was ill, because they should have shewn a special performance. And he said, the opinion of the court was so about four years ago in the case between the *Middle Temple* and Mr. *Allison* upon such a bond, and such a plea, and such a breach. But to this no opinion was given by the court. See for it 1 *Sid.* 215, 334. 1 *Bulstr.* 31, 43. *Cro. Eliz.* 749. 1 *Roll. Rep.* 173, 382. *Cro. Eliz.* 232. 1 *Ventr.* 121. *Moor* 856. pl. 1175. *Hob.* 12. 1 *Saund.* 52. 2 *Saund.* 409. *Cro. Jac.* 559. *Cro. Car.* 421. 2 *Mod.* 305. difference between the pleading.

Coux vers. Lowther. Error C. B.

Intr. *Mich.* 11 *Will.* 3. B. R. Rot. 502.

Thomas Lowther brought an action of trespass against *Lancelot Salkeld senior, Lancelot Salkeld junior, and George Coux*, of his house broken, and of the expelling him from his house, and keeping possession; and of his goods *ibidem inventis captis et asportatis*, &c. The three defendants appeared by one attorney, and *Coux* pleaded not guilty to the whole; upon which issue is joined. The two *Salkelds* *quoad* the force and arms, and the expulsion, and the extratention of the plaintiff out of the house, plead not guilty, upon which Issue is joined: and *quoad* the residue of the trespass they justify, as bailiffs to Sir *George Fletcher*, the taking of the goods as a distress for rent arrear reserved upon a demise to the plaintiff by Sir *George Fletcher* of the premises, &c. The plaintiff replies, that they committed the residue of the said trespass of their own wrong, *in forma qua idem* the plaintiff *superius versus eos inde queritur*, *Absque hoc* that they took the goods *in et super dimissa praemissa prout illi superius allegaverunt Et hoc paratus est verificare*, &c. The two *Salkelds* rejoin, that they took them upon the demised premises *prout superius placitando allegaverunt, Et de hoc ponunt se super patriam*. And the plaintiff *similiter*. The entry was, that at the day in bank the plaintiff *venit per attornatum suum praedictum*; and by the *postea* it appeared, that the jury found *Coux* guilty of the trespass, &c. *Et quoad primum exitum* between the plaintiff and the two *Salkelds* joined, *unde* they said that they are not guilty; the jury found them guilty; *Et*

*quoad alium exitum between the plaintiff and the two Salkelds interius similiter junctum iidem juratores super sacramentum suum dicunt quod praedicti the two Salkelds the goods inframentionate in et super dimissa praemissa non ceperunt prout praedictus the plaintiff superius replicando allegavit; and they give damages 14*l.* costs 40*s.* and then the entry continues, Et super hoc idem the plaintiff dicit quod praedictus Lancelot Salkeld senior modo mortuus existit, et praedicti Lancelot junior et Georgius hoc non didicunt; quodque praedictus Lancelot junior tempore comparentiae suae praedictae per praefatum Josephum Rolfe attornatum suum ut praefertur, scilicet crastino sanctae Trinitatis anno regni domini nunc regis nono, et diu postea fuit infra aetatem viginti et unius annorum, Et ea ratione petit judicium versus praefatum Georgium de et super veredictum praedictum sibi reddi; Ideo consideratum est, quod praedictus Thomas recuperet versus praefatum Georgium damna sua praedicta ad sexdecim libras per juratores praedictos in forma praedicta assessa necnon quatuordecim libras sex solidos et octo denarios eidem Thomae ad requisitionem suam pro misis et custagiis suis per curiam hic de incremento adjudicatos, quae quidem damna in toto se attingunt ad triginta libras sex solidos et octo denarios; Et super hoc idem Thomas fatetur se nolle ulterius prosegui versus praefatum Lancelot Salkeld juniorem super veredictum praedictum, sed ulterius prosegui super veredictum illud penitus deadvocat et recusat; Ideo consideratum est, quod praedictus Lancelot junior eat inde sine die, &c. et quod praedictus Thomas habeat executionem versus praefatum Georgium de damnis praedictis, &c. Upon which judgment Coux brought a writ of error, and assigned the general errors. And Mr. Northey council for the plaintiff in the writ of error argued, that this entry of the *nolle prosegui* amounted to a *retraxit*, and therefore cannot be entred by attorney, but ought to be entred in proper person; and therefore being entred by attorney it is error. And for that he cited 8 Co. 58. a. Beecher's case, in point. 1 Roll. Abr. 584. Co. Li. 138. b. 139. a. Co. Entr. 283. But against this it was argued by Raymond for the defendant in error, that the entry here of the *nolle prosegui* is not by attorney; for though the plaintiff in the original action appears at the return of the *postea* by attorney, yet when he enters the *nolle prosegui*, he says, *quod idem Thomas, viz.* the plaintiff, *fatetur*, &c. and it is not said, as it is in Beecher's case, that the plaintiff *per attornatum suum fatetur*, and therefore the court will take it to be entred in proper person; for since it is not expressly said to be by attorney, they will intend it to be in proper person, because such intendment will support the judgment, whereas the contrary intendment would reverse it; and always where the court betakes itself to intendment, it shall be rather to affirm, than to reverse any judgment. And for this he cited the case of *Pemberton v. Stanhope* adjudged in this court this*

At the return of the *postea* entry is made, that one of the defendants who justified is dead, and that another was an infant and appeared by attorney, therefore he prays judgment against the other, and he has it.

Nolle prosegui entred against the infant.

Retraxisit what; it cannot be entred by attorney.

Pemberton v. Stanhope.

term

term, where the entry was as in this case as to this matter: and *Turton* and *Gould* justices (*absente Holt* chief justice) held, that the entry was in proper person, and not by attorney. And of that opinion they were in this case; but as to this *Holt* chief justice gave no opinion. 2. He argued, that this entry of the *nolle pro-* *Nolle prosequi.* *sequi* did not amount to a *retraxit*, which would be a release, but that it is an agreement, that the plaintiff will not proceed against the other defendant, and that such agreement and acknowledgment shall be an absolute bar as to him, but that notwithstanding the plaintiff might proceed against the other defendants. And for this he cited *Cro. Car.* 239, 243. 2 *Roll. Abr.* 100. pl. 5. *Walsh v. Bishop*, as a resolution in point; where in battery against two the one pleaded not guilty, the other justified, upon which several issues were joined, and verdicts in both for the plaintiff, and several damages; the plaintiff entered a *nolle prosequi* against the one defendant, and took judgment against the other; and it was objected, that the entry of the *nolle prosequi* amounted to a *retraxit*, and therefore it being entered before judgment against the other, he could not have judgment against him, because a *retraxit* is a release, and a release to one in trespass is a release to all; but the court held that it was not a *retraxit*, but a bare acknowledgment, that he would proceed no farther against him. And *Cro. Car.* 551. *Dennis v. Powell*. 3. He cited several cases, where such entries were by attorney. *Co. Entr.* 172. b. 650. b. 676. b. 303. a. 699. a. 1 *Book of judgments*, 127, 205, 219. 181, 655, 190. 2 *Book of judgments*, 239. pl. 29, 52. pl. 1. 60. pl. 12. 70. pl. 34. 78. pl. 59. 89. pl. 16. 153. pl. 28. 223. pl. 12. 152. pl. 6. 237. pl. 24. *Rast. entr.* 583. a. 654. b. 2 *Saund.* 379. *remisit damna* entered by attorney. 1 *Saund.* 342. *Jemmot et al v. Bagus.* *Intr.* *Jemmot v. Bagus.* *Hill.* 3 *Will. & Mar. B. R. Rot.* 759.

And *Holt* chief justice said, that it is a great question, if this would be a *retraxit*; and it seemed to him that it would not. But he gave no positive opinion. And he seemed to make a difference, where there are many defendants, and where but one; that in the former case a *nolle prosequi* will not amount to a *retraxit*, *contra* where there is but one defendant. See 6 *Edw.* 3. 30, 31. Then Mr. *Northey* argued farther, that this judgment ought to be reversed; because at the time when the court gave judgment against *Coux* for the whole damages, to which the other defendants were liable the damages being joint, they did not know, whether the plaintiff would enter a *nolle prosequi* against the other defendants; and therefore it was erroneous in the court, to give judgment against one defendant, and to do nothing as to the other; and therefore that it was a discontinuance, and in trespass a discontinuance as to one is a discontinuance as to all. 39 *Ed.* 3. 3. 30 *Assis.*

Where a *nolle prosequi* will amount to a *retraxit*.

Affs. 36. 38 *Affs.* 17. And he cited *Cro. Eliz.* 762. *Green v. Charnock & Starnell*, where in trespass *Starnell* did not appear at the day at which he ought by the imparlance; *Charnock* pleaded in bar, to which the plaintiff replied, and upon demurrer day was given till the next term, and then it was adjudged for the plaintiff, and the same term he entered a *nolle prosequi* against *Starnell*, and then a writ of inquiry was awarded against *Charnock*, and upon the return adjudged against him; and upon error brought this judgment was reversed, because there was no judgment entered against *Starnell* by *nil dicit*, nor day given, which was a discontinuance of the suit; and the *nolle prosequi* against him comes too late, and a discontinuance against one was a discontinuance against both, and of the intire suit. And so in the present case the *nolle prosequi* comes too late, the suit being discontinued before; but it might have been otherwise, if the *nolle prosequi* had been entered before the judgment, as the cases are of *Walsh v. Bishop*, *Cro. Car.* 239. and *Rodney v. Stroud*, 3 *Mod.* 101. 2. He agreed, that there are authorities, that where the defendants sever in plea, and the jury find several damages, that the plaintiff may take judgment against the one, and enter a *nolle prosequi* against the other, the *nolle prosequi* being entered before the judgment; but there is no case in the books that warrants such entry of a *nolle prosequi* where the jury find the damages jointly. That this matter of the entry of *nolle prosequi's* has received already too much countenance, and ought not to expect any more encouragement, since they tend to encourage the joining of persons in actions for vexation only, where the party has no cause of action against them. 3. He said, that the appearance of the infant by attorney was error, and amounted to a discontinuance; and that the plaintiff could not take judgment against the one defendant without the other, because that were contrary to his demand in his writ, and therefore it abates his writ. And for these reasons he prayed, that the judgment might be reversed.

E contra it was argued by *Raymond* for the defendant in error. And he agreed, that if in this case judgment had been taken against all the defendants, it had been erroneous, and ought to have been reversed as to all, and not only as to the infant, who appeared by attorney, or only against the dead man. *Cro. Jac.* 290. 1 *Roll. Abr.* 776. pl. 6. *Bird v. Bird*. *Cro. Jac.* 303. *King v. Marborough & Crake*. *Allen* 74. *Stile* 121. *Oates v. Aylett*. Assault and battery against four, one being an infant, and all appeared by attorney; judgment for the plaintiff, and it was reversed as to all. 1 *Roll. Abr.* 775. pl. 2. *Scudamore v. Scriven*, trespass and verdict against three defendants, one dies, judgment against all, and it was reversed as to all, and not only as to the dead man.

Judgment against several, one an infant appearing by attorney, shall be reversed as to all the defendants.

And the reason is given in the said books, because the judgments were intire; which reason fails in this case, since no judgment is taken against him who appeared by attorney, nor against the dead man. And as to the dead man, that seems to be a settled point, that where trespass is brought against several, and they plead not guilty, and one of them dies, and a *venire* and *disstringas* issue to try the issue between the plaintiff and the two defendants, and a verdict for the plaintiff against both; the plaintiff may surmise the death of one of the defendants, and shall have judgment for the whole against the other, and good. 4 Hen. 7. 7. 7 Hen. 6. 21. b. Cro. Car. 426. W. Jones 367. 1 Roll. Abr. 767, 756. Tipping v. Lenton, and 1 Ventr. 249. 3 Keb. 254. England v. Clerk. Stile 299. Preston v. Mortlock. And of this opinion the whole court seemed to be as to the dead man. And then he urged, that now no judgment being taken against the infant who appeared by attorney, he is *quasi* out of the case. That although there are not many books, that warrant the taking of judgment against one of the defendants, and the entry of a *nolle prosequi* as to the other, where the damages are joint; yet it seems to be warranted by the reason of the law; for where divers persons commit a trespass, the law regards them all as principal actors, though one of them be more active than the other; and therefore the party may either have an action against one, and recover all his damage against him; or have an action against them all, and make them all to contribute to his reparation; therefore since *Coux* might have been charged with all the damages in an action against him alone, he has no reason to complain, for the number of the defendants is not any measure of the damages to the jury, but the injury sustained; so that there is no particular prejudice to this defendant, he sustaining the whole burthen, since he was originally chargeable with the whole; and therefore no reason to reverse this judgment, because he is charged with the whole. Hob. 70. 1 Roll. Rep. 233. 2 Roll. Abr. 100. let. F. pl. 1. Parker v. Sir John Lawrence and Wood; Trespass, &c. against three, one of them pleads not guilty to the whole, upon which issue was joined, the other two justify, upon which there was a demurrer; the issue was tried, and verdict for the plaintiff, and damages; as to him the plaintiff took judgment, and as to the others he entered a *nolle prosequi*, and good; and yet there the two defendants, against whom a *nolle prosequi* was entered, were bound by the damages found by the jury upon the other issue, and the said damages ought to be assessed jointly; for though they ought to be assessed conditionally as to the demurrer, yet they ought to be joint; for if they were assessed severally, and judgment afterwards should be for the plaintiff upon the demurrer, he would have two recompenses, viz. one against him who was found guilty, and the other against them upon whose

plea he had demurred. 1 Roll. Rep. 395. *Headley v. Sir Antony Mildmay*. 15 Edw. 4. 26. b. per Littleton justice. And all the cases aforesaid of the dead man seem to be cases in point; for there the jury found joint damages, yet upon suggestion that the one was dead, judgment was always against the other. And it is no objection to say, that there is the act of God, for the act of God does wrong to no man, and therefore if it were a wrong to the survivor, such suggestion would not be admitted. *Stile* 349. *Butcher v. Orchard*. Case against husband and wife for words spoken by both, not guilty pleaded, the husband was found guilty, the wife not guilty; it was held to be aided by the verdict; and per Rolle chief justice, there might have been a release of the damages as to the wife, if both had been found guilty. 2 Roll. Abr. 100. pl. 5. it seems to be a case in point. *Trin.* 3 Car. C. B. Rot. 1948. *Lanman v. Stileman* and three others in trespass; the three plead a special plea, upon which a special issue is joined, the other pleads not guilty; verdict for the plaintiff, and joint damages; the plaintiff relinquishes his suit as to the one, and takes judgment as to the other three for the damages and costs; which seems to be a case in point. And as to the other objection, that the *nolle prosequi* ought to have been entred, before the judgment taken against *Coux*; but now the contrary being done, the suit is discontinued; he argued, that this objection was the reverse of the objections that were used to be made in these cases; for the objection used to be, that if the *nolle prosequi* was entred before judgment, it would be a release; but there are many books, that it may be entred after judgment taken against the other defendant. 14 Edw. 4. 6. per Littleton. *Trin.* 15 Edw. 4. 26. b. 2 Roll. Abr. 100. pl. 2. *Evelie v. Slolie*. *Hob.* 180. *Hob.* 70. *Cro. Car.* 243. 1 Roll. Rep. 395. *Sir Antony Hendly v. Mildmay*. And the present objection might have been made to the said cases; for the court, when they gave judgment, could not say, whether the plaintiff would enter a *nolle prosequi* or not; and if he had not, the whole would have been discontinued; but in the said cases it is held good, and no discontinuance, when the *nolle prosequi* was entred, for upon the whole it appears that there was not any discontinuance.

But the whole court seemed to be of opinion for the plaintiff in error. And *Holt* chief justice said, that it would be very difficult to maintain this judgment, the damages being joint, and judgment being entred against the one, before the *nolle prosequi* was entred as to the other, so that at the time of the judgment it was erroneous to charge *Coux* with all the damages, and give no judgment against the other. But *adjournatur*, to hear council again, &c.

Memorandum,

Memorandum, Immediately after the end of this term Sir Nicholas Lechmere, baron of the Exchequer, petitioned the King to have leave to resign his office of baron; which was granted to him, and he surrendered his patent accordingly.

Rex vers. Davison.

THE defendant being brought into court upon the return of a *habeas corpus*, it appeared that he was taken upon a writ of *excommunicato capiendo*, being excommunicate for having kept school without licence of the ordinary. And it was said by the council, that a man may keep school without such licence; and that in *Oldfield's* case lately a prohibition was granted, to stay a suit against a man in the ecclesiastical court for having kept school without licence. But the court said, that the prohibition was only granted with intent that the plaintiff should declare upon it, in order that the matter might be more judicially determined. Then Mr. *Northey* moved, that the defendant might be bailed, until the matter in law should be determined upon the return of the *habeas corpus*. And *Holt* said, that Sir *Samuel Astry* said, that the course of the court was, never to bail upon a *habeas corpus*; but that he was of a contrary opinion; and that they bailed *Clerk* upon the return of a *habeas corpus* two or three years before, whilst the matter of the return was debated, and that he afterwards discharged him. And at another day Mr. *Northey* cited *Vaugh.* 157. *Cro. Car.* 552, 557. and *Mich.* 29 *Car.* 2. *B. R. Rex v. Price*; where *Price* was bailed pending the consideration of the court upon the return of the *habeas corpus* upon which he was brought to the King's Bench; and that afterwards *Price* was recommitted. And *Holt* said, that he was not satisfied that *Davison* ought to be discharged, because the excommunication was in force. But he was bailed to appear *de die in diem*, until the matter of the return was determined; and then to render himself to prison, if the judgment of the court were accordingly.

S. C. 1 Salk.

105, 134,

294.

If a man may

keep school

without a

licence.

1 Bull. 112.

Farr. 59, 161.

1 Cro. 507,

552, 558.

Latch 174.

Cro. Ja. 29,

67.

1 Ro. Rep.

132, 384.

1 Sid. 286.

2 Ro. Abr.

113.

Bail.

Mich.

Mich. Term

12 Will. 3. B. R. 1700.

Sir John Holt Chief Justice.

Sir John Turton
Sir Henry Gould } *Justices.*

Call of ser-
jeants.

Memorandum, *That upon Wednesday the thirtieth of October Sir Joseph Jekyll knight, chief justice of Chester, Robert Tracy esquire, judge of the King's Bench in Ireland, and William Hall esquire, of the Middle Temple, Green, John Keen and Henry Turner esquires, of Lincoln's Inn, Charles Whitaker, Gibbons, Philip Neve, Nicolas Hooper, James Mundy, John Pratt, James Selby and Thomas Carthew esquires, of the Inner Temple, Thomas Bury, John Hook, Lawrence Agar and John Smith of Gray's Inn, appeared in Chancery in obedience to writs returnable mense Michaelis this term, directed to them, requiring them to take upon them the degree of serjeants at law; and they took the oaths there, and the lord keeper Wright made a very short speech to them. And Wednesday following, being the sixth of November, they came to Grays Inn hall (of which society the chief justice Holt was) where they rehearsed their counts, and were coifed; and then they walked to Westminster, and counted at the Common Pleas according to custom, the lord keeper being present in court all the time: And they gave rings, of which the inscription was, Imperium et libertas. And then they made an entertainment at Serjeants Inn hall in Fleetstreet.*

Precedence. Note; Sir Joseph Jekyll was made King's serjeant, and therefore he preceeded all the others, to all of whom he was junior.

Note; a question arose about Mr. Tracy and Mr. Gibbons, and the other serjeants, about seniority, because though they were more ancient to some of the others by admittance in their societies, yet their writs

writs bore teste after the writs of the others. But the lord keeper determined it in favour of Mr. Gibbons and Mr. Tracy, that they should not lose their seniority, though their writs were tested after, since they were returnable at the same time. But note, that the lord keeper, when he was serjeant, always took place of serjeant Bonithon, to whom he was junior by admittance, because his writ bore teste before that of Bonithon, though they were returnable at the same time.

There was another question also about Mr. serjeant Agar, for he was transferred from one of the inns of Chancery to Gray's Inn; and the question was, if he should be allowed the time of his admittance at the inns of Chancery? The benchers of Gray's Inn allowed it him; but it being moved to the judges of the Common Pleas, they refused to allow it.

Memorandum, This term Mr. serjeant Tracy was made a baron of the Exchequer in the room of baron Lechmere, who had resigned.

Wilbraham *vers.* Doyley.

ERROR to reverse an outlawry in Chester. The defendant pleaded, that no bail was put in before the allowance of the writ of error, and the statute of 31 Eliz. cap. 3. S. C. Cases B. R. 545. Ante 591. for error in reversing outlawries. *Per curiam*: This is no plea; for it is well enough, if bail be put in at any time before the reversal. The error here was the want of *pro comitatu*.

Caweth *vers.* Philips.

Intr. Trin. 12 Will. 3. Rot. 358.

DEBT upon bond by the plaintiff, as executor of the obligee. The defendant pleaded, that the obligee made the defendant executor during the minority of the plaintiff, and that the plaintiff became executor at his age of seventeen. The plaintiff demurred. And *per curiam*, this cannot be a suspension of the action, because the defendant was only executor in trust for the plaintiff during his minority. See *W. Jones* 345. *Dorchester v. Webb*. *Adjournatur*.

Mason *vers.* Keeling.

Intr. Hill. 11 Will. 3. Rot. 341. B. R.

B. C. Cases
B. R. 332.
12 Mod.
Case for keep-
ing canem mo-
lossum, Anglice
a mongril
mastiff, valde
ferocem, and
does not say
sciens.

Ante 109.
12 Mod. 332.

3 Keb. 650.

IN an action upon the case the plaintiff declared against the defendant, for that, *quod ille quendam canem molossus, Anglice a mongril mastiff, valde ferocem custodivit et retinuit et canem illum in communi platea vocata Waterstreet in, &c. ore ejusdem canis adtunc minime ligato existente, Anglice not musled, libere et ad largum ire permisit, idem canis pro defectu debitae curae et custodiae ipsius the defendant ipsum the plaintiff adtunc per communem plateam apud, &c. circa legitima negotia sua transeuntem furiose et violenter impetivit, et ipsum the plaintiff adtunc et ibidem graviter momordit et vulneravit, et suram, Anglice the calf, cruris sinistri ipsius the plaintiff graviter momordit et vulneravit, &c.* To which declaration the defendant demurred. And the exception taken to this declaration by the defendant's council was, that the plaintiff has not shewn that the defendant knew that this dog was *valde ferox*; without which knowledge he shall not be answerable for any injury, that he of a sudden, and unknown to the defendant, did to the plaintiff. And it was argued three times severally, by Mr. Northey, Darnall King's serjeant, and Mr. Peere Williams, for the plaintiff; and by Mr. Boulton, Sir Bartholomew Shower, and Mr. Raymond, for the defendant. And the council argued for the plaintiff, that though in such actions as this here it has been held necessary in many cases to say *sciens* in the declaration; yet where the fact has such circumstances as this hath, the omitting of *sciens* will not vitiate the declaration. For in this case the dog is shewn to be *valde ferox*; and then to permit such a dog to go at large in the high way, is a common nuisance; and then whosoever receives any particular prejudice or damage, shall have an action, 1 Vent. 295. A coachman driving a young pair of horses in *Lincoln's Inn fields*, to use them to the coach, the horses ran away with the coach, and threw the coachman out of his box, and run over a man; and for this an action was adjudged maintainable, because every one ought to take care that his tame cattle do no injury to any body, and if they do, he shall be compelled to make reparation for the injury sustained. And in the said case another case was cited, where an action was brought against a butcher, where an ox had run out of the stall, and gored the plaintiff, and it was laid in default of keeping the ox tied up. And also the case of a monkey, which bit a child, and an action was brought against the owner for it, &c. And in the same case a distinction was taken, that if a fox breaks his chain, and runs away, and does any mischief, and does not return to the owner,

owner, that no action will lie against the owner, because it seems that the fox was returned to his wild nature; but otherwise, if the fox returns to his owner. And the present case was likened to the case, if a coachman leaves his coach and horses in the street, and they do any mischief, for this neglect an action lies against him; for a man shall be answerable for all mischief proceeding from his neglect or his actions, unless they were of unavoidable necessity. *Hob. 234. Weaver v. Ward; T. Jones 235.* And for these reasons they prayed that judgment should be given for the plaintiff.

But against this it was argued by the defendant's council, that a man shall not be answerable for any bite, or other injury, done Exod. xxi. ver. 28, 29. by his dog, unless he had notice of such a thing done by him before. And for this they cited *Reg. 111. Dier 25. pl. 162. Fitzb. coron. 311. Cro. Car. 487. 1 Roll. Abr. 4. 2 Sid. 127.* Where it is held, that *scienter* at least ought to be in such case shewn in the declaration, and ought to be proved upon the evidence. Then for the same reason, if there is nothing to distinguish this case from the said cases but the word *ferox*, which imports fierceness of nature, the plaintiff should have shewn that the defendant had notice of this fierce quality; for as in the one case he shall not be answerable for the biting of his dog, without having notice that he had used so to do; so in the other case he shall not be answerable, without knowing that he was of a fierce quality; without which knowledge the law permits any man to keep them as domestick animals, and does not require such guard to be set over them as other animals, which are not so familiar to human kind, and consequently may be supposed to be more easily irritated to do mischief. And as to the objection, that this dog was a mastiff, and of consequence the owner must know that he was of a fierce nature; it was answered, that this dog is laid to be a mungril mastiff, and the law does not take notice of any such sort of dog. *3 Cro. 125. 1 Saund. 84.* where the sorts of dogs are enumerated (but no mention made of a mungril mastiff) of which the law takes notice. Farther, that admitting a mastiff to be fierce, this mungril might degenerate from the fierceness and nobleness of the nature of the mastiff by the mixture of the *species*. Besides, that in the case of a mastiff *sciens* ought to be in the declaration; as the case is, *Cro. Car. 254. Boulton v. Banks.* As to the objection, that this was in the high way, and therefore the master ought to give satisfaction for the injury done by his dog, because he ought not to permit the dog to go at large there; it was answered, that it does not appear that it was in the high way, for it is only said *in communi platea*; but it is not said, that the subjects usually resort there, or pass through it. Now it must be granted, that a man may be indicted for a nuisance erected *in communi platea*; but that must be as done in

in the highway, and the indictment ought to be so, and not in *communi platea*; for the law takes no notice of *platea*, which signifies nothing but a wide place, and oftentimes a court-yard: and it may be, for any thing that appears to the contrary, that this was in the defendant's yard: and then it can never be likened to the case of nuisances. As to the case of 1 *Ventr.* 295. the declaration implied a sufficient notice, for the coachman was breaking unruly horses, in a place where there was a great concourse of people, and therefore not like the present case. And for these reasons they prayed judgment for the defendant.

Difference between horses, oxen, &c. and dogs.

A horse put to graze does mischief.

And *per Holt* chief justice and *Turton* justice, the declaration is ill for want of shewing, that the defendant had notice, that the dog was fierce. For there is a great difference between horses and oxen, in which a man has a valuable property, and which are not so familiar to mankind, and dogs; the former the owner ought to confine, and take all reasonable caution, that they do no mischief, otherwise an action will lie against him; but otherwise of dogs, before he has notice of some mischievous quality. But in the former case if the owner puts a horse or an ox to graze in his field, which is adjoining to the highway, and the horse or the ox breaks the hedge, and runs into the highway, and kicks or gores some passenger, an action will not lie against the owner; otherwise if he had notice, that they had done such a thing before. Now for any thing that appears to the contrary, the owner might not have had this dog but one day or two before, and did not know of this fierce nature; and then the dog, because the door was left open, ran out, and bit the plaintiff; it will be very hard, to subject this defendant the owner to an action for it. Otherwise, if the defendant had known before, that this dog was of such a fierce nature, for he ought to have kept him in at his peril. And *per Holt* chief justice. If *A.* has a dog used to bite, &c. and he knows it, and he gives it to *B.* *B.* being conscious of this quality; if the dog bites, &c. an action will lie against *B.* Otherwise if *B.* had not been conscious of this quality. And (by him) the law does not oblige the owner to keep the dog in his house; for if the dog break a neighbour's close, the owner will not be subject to an action for it. *Poph.* 161. *W. Jones* 131. But if a servant leaves open the stable door, and a coach-horse runs out and does mischief, it is otherwise. But *Gould* justice was of opinion, that the declaration was good; because the averring, that the dog was fierce, made the owner liable to an action for an injury done by such a dog, because he did not keep him in a safe place. But *adjournatur*. And afterwards the parties agreed between themselves, and each of them bore the loss of what each had expended, and therefore no judgment was given. See 20 *Edw.* 4. 11.

Johnson

Johnson *vers.* Oldham.

MR. *Lutwyche* moved for a prohibition to be directed to the spiritual court, to stay a suit there for a mortuary, upon a suggestion of the 21 Hen. 8. cap. 6. and that there was no custom here for the payment of it. And he urged that no mortuary was due, but by custom; and therefore the custom here being denied, they ought not to proceed in the spiritual court. And he cited *Cro. Car.* 237, 8. *Hinde* and the bishop of *Chester*. Against which it was argued by Mr. *Northey*, that the statute of *Henry 8.* has saved the jurisdiction to the spiritual court, where mortuaries have been usually paid. Besides, that they ought to plead, that there was not any such custom, in the spiritual court, and then upon refusal there to admit the plea, to move the King's Bench, but not before such refusal; but here they have not pleaded this matter in the spiritual court. And *per Holt* chief justice a prohibition cannot be granted, without a denying of the custom in the spiritual court, which is not done here. And the whole court seemed to be against the prohibition. And a rule was made to hear council on both sides. And afterwards the rule was discharged by *Turton* and *Gould* justices, *absente Holt* chief justice.

A prohibition shall not be granted, to stay a suit in the spiritual court for a mortuary, without denying the custom in the spiritual court.

Rex *vers.* Browne et al'.

A *Certiorari* was granted to remove all indictments against *B. S. C.* *Salk.* *C. and D.* And they return one indictment against *B.* another against *C.* and another against *D.* in which they were indicted alone by themselves. And upon a motion to quash the indictment in which *B.* was indicted; it was held, that it was not removed before the King's Bench; because an indictment in which *B.* was indicted alone, is not the indictment intended by the *certiorari*, which means indictments in which *B. C. and D.* were jointly indicted. It would have been otherwise, if the *certiorari* had been, *vel per quod aliquis eorum indictatus existit.*

Variance between a *certiorari* and the record removed.
1 Roll. 395.
Bro. Recordare 2.
Dier 34.
1 And. 133.
2 And. 149.
3 Saund. 292.

Rex *vers.* Lamb.

AN indictment against him, for having said maliciously, *magistratos civitatis Litchfield fore societatem asinorum*, was removed by *certiorari* into the King's Bench. And motion was made by Mr. *Hawkins* and Mr. *Mulse*, to quash it, because it was insensible, for there is no such word as *magistratos*. And for this reason

Indictment quashed for false Latin.

reason it was quashed by *Turton* and *Gould* justices, *absente Holt* chief justice, though opposed by *Mr. Nott* recorder of *Litchfield*.

Rex vers. Dorny.

S. C. 1 Salk.
260.

If an inquisition for forcible entry, ought to shew, what estate the tenant has, and ought to shew an express disseisin. F. N. B. 248. 5 Mod. 321, 447. Far. 115, 123, 138. Poph. 205. 6 Mod. 195. 1 Hawk. 94. 2 Hawk. 293. 3 Salk. 169. Comb. 70.

MR. *William Thompson* moved for the quashing of an inquisition for a forcible entry, for that, that it did not appear what estate the tenant in possession had; but it was only, that the defendant and others, &c. *in mesuagium existens* a school house *ad tunc existens tenementum de J. S. intraverunt*, and the said *J. S. disseisit. expulsum, et ejectum, extratenuere*. And *J. S.* perhaps was but tenant at will, which is not within any of the statutes. But *Mr. Lechmere* said, that the *disseisit.* should be intended *disseisiverunt*; which implying, that the tenant in possession had a freehold, it shall be well enough, according to 3 *Leon.* 102. *Palm.* 277. *Allen* 49. But *Mr. Thompson e contra* said, that 1 *Sid.* 102. *possessionatus* is held to be ill; and 1 *Ventr.* 306. *disseisivit* is held ill. But *per Holt* chief justice there ought to be a positive charge of a disseisin; but it is put only adjectively, and an expulsion is not laid; but that *J. S. disseisit. et eject. extratenuere*; which is a conclusion without sufficient premisses. And therefore the inquisition was quashed. *Ex relatione m'ri Jacob.*

S. C. 3 Salk.

145.
Error does not lie upon a judgment in partition before the final judgment, *quod partitio stabilis sit, &c.*

Finch vers. Ranow.

A Writ of error was brought upon a judgment, *quod partitio fieret*, in a writ of partition, and before the final judgment. And therefore the record was held not to be removed, and the writ was quashed. *Ex relatione m'ri Jacob.*

Read vers. Hudson.

You are a rascal, you are a pitiful sorry rascal, you are next door to breaking, spoken of a tradesman, actionable. Ray. 86. Lev. 115. Keb. 602, 644.

IN case for words the plaintiff declares, that he was a laceman, and that the defendant, speaking of his trade, said such words, &c. and he lays another count, and says, that the defendant *ex ulteriori malitia sua de statu* of the plaintiff *colloquium habens* said these words, "You are a rascal, you are a pitiful sorry rascal, you are next door to breaking," *quorum quidem verborum* (omitting *praetextu* or any like word) the plaintiff sustained a special damage, *ad damnum, &c.* Upon not guilty pleaded, and verdict for the plaintiff, *Darnall King's* serjeant moved in arrest of judgment, that the words of themselves are not actionable. For there are many cases, where defamatory words have been held not actionable.

tionable. Mar. 15. Noy 77. 2 Cro. 345. Hardr. 8. And then the special damage in this case will not help it, because it is not laid, to have been occasioned by the speaking of these words, the word *occasione* or *praetextu* being omitted. And they are not laid to have been spoken of his trade, for the word *status* will not import that, but it ought to have been *arte vel misterio*. But *absente Holt* chief justice, the court gave judgment for the plaintiff; for the plaintiff declaring, that he was a tradesman, and that the words were spoken *de statu suo*; it is equivalent to *arte sua*, and to be intended of his trade; and then being spoken of him in his trade they are actionable, though the special damage be left out of the case. *Ex relatione m^ri Jacob.*

Snow *vers.* Firebrace.

THE plaintiff declared, that the defendant, in consideration S. C. Saller, that the plaintiff had found him *sufficientia esculenta poculenta*^{439.} *lotionem et cubile pro diversis mensibus ultimo praeteritis*, assumed to S. C. 12 Mod. 434. pay him as much as he should deserve, and avers that he deserved *Assumpsit* upon so much, &c. Upon *non assumpsit* pleaded, verdict for the plaintiff. *a quantum meruit* for having found And a motion was made in arrest of judgment, that this declaration was intirely uncertain, having neither certainty of time nor of things. sufficient But *per Holt* chief justice. He did not know, why the uncertainty meat, drink, of time was worse than the uncertainty of things, which have been &c. oftentimes adjudged good. And (by him) it is enough to aver, *quantum meruit.* *Ex relatione m^ri Jacob.*

Clapcott *vers.* Davy.

Indebitatus assumpsit and *quantum meruit*, for work done, and Award of satisfaction to goods sold and delivered. The defendant pleaded an award, by part of the demand is not which it was awarded, that the plaintiff for the work done, &c. good. should accept a bill of sale before made of the eighth part of the ship *Fortune*, or a like bill of sale to be made, and that the plaintiff and defendant should give to each other general releases. The plaintiff demurred. And Mr. *Branthwaite* for the plaintiff took exception to the plea. 1. That the award is pleaded to extend to all the promises, whereas it appears, that it extends but to the work done, and therefore the defendant should have pleaded *non assumpsit* to the promise for the goods sold and delivered; and for want of this the plea is ill. For an award is no plea in bar, unless something be awarded in satisfaction of the plaintiff's demand; and nothing being awarded for the goods sold and delivered, it is ill. For though there is a general release awarded, yet of itself that

that will be no bar, according to the case of *Freeman v. Bernard*, Trin. 9 Will. 3. B. R. ante, 247. though the suing of an action in such case may be a breach of the award, upon which the defendant might bring his action. 2. Exception. That the award was, that the plaintiff should accept the bill of sale, and the defendant was not awarded to deliver it, and so nothing was awarded to the plaintiff in satisfaction for the work done. And he compared it to the case of 2 Saund. 293. Yelv. 98.

And Holt chief justice said, that nothing was awarded for the goods sold and delivered, and therefore the case the same with that of *Freeman v. Bernard*, nothing being awarded for that but a general release. If the bill of sale had been awarded in full of all demands, it had been good. But this release awarded here is not a perfect bar, until it be executed. And as to the other matter he said, that the defendant is not enjoined to do it, which is the only satisfaction that the plaintiff should have. But the award is only, that the plaintiff should accept. And then the plaintiff cannot be barred, nothing being awarded to be done by the defendant in satisfaction.

Hooper v.
Hurst.
An award
made good by
implication.
Ante 247.

Afterwards at another day (*absente* Holt chief justice) Mr. serjeant *Cartwright* urged, that if the first objection should be allowed, the declaration might be so varied as to make no award pleadable. To the second objection, he cited a case very lately adjudged in the Common Pleas between *Hooper* and *Hurst*, where an award was, that the defendant should pay to the plaintiff 10*l.* and fetch away his mare and colt; and upon exception it was held to be mutual, and implied a delivery by the plaintiff; and it was adjudged accordingly, for supporting of honest awards.

But Mr. *Branthwaite* answered, that the words of the award are, that the work done was rated at 32*l.* and that for that the plaintiff would accept a bill of sale, &c. Now no action for goods sold and delivered can be brought for work done.

And *per Gould* justice it is without doubt, that if nothing be awarded but the general releases, the plea will be ill. Then leaving them out of the case, this award cannot extend to this demand. For though it is objected, that the goods sold and delivered is the same demand with that for work done, yet the court cannot take notice of that upon such generality. But if the defendant had shewn it by particular averments, it might have been construed to be within that part of the award. And averments are admitted in pleading to make an award good. 2. The second objection seems to be a good objection, for an award cannot be made good by implication. If the defendant would not have delivered

delivered the bill of sale, the plaintiff could not have assigned a breach of the award by implication. And judgment was given for the plaintiff, *absente Holt* chief justice. *Ex relatione m'ri Jacob.*

Moor vers. Watts.

UPON a *habeas corpus* the sheriff returned, that *Watts* was in S. C. ^{2 Salk.} his custody upon a *capias in withernam*. And the case was, ^{581.} that a *homine replegiando* was brought; and the sheriff returned an ^{Lilly's Entr.} inquisition, finding, that the party was eloined by *Watts*; and upon ^{293.} that a *capias in withernam* issued, and the defendant was taken ^{S. C. 12 Mod.} upon it; and a motion was made to the court, that *Watts* might be bailed. And upon several motions, this case being a new case, the court took great consideration upon it, and resolved these matters. ^{424, 425. Comb. 28.}

1. That the defendant cannot be bailed upon the *habeas corpus*, In *homine replegiando* the defendant cannot be bailed upon a *habeas corpus* before the return of the writ. being taken by the King's writ; and that therefore the defendant's counsel moved too soon, the writ not being returnable until *octabis Martini*, which was almost fifteen days after the first motion made in this case; but the defendant ought to come in when the writ was returned, and demand a declaration, and plead *non cepit*, and then the court will bail him. And as to the objection made, that men had been bailed upon appeal of murder brought against them, before the return of the writ. *Holt* chief justice confessed, that he had known some judges do so at their chambers, but that he always looked upon it as a mistake, and that it could not be done. A man cannot be bailed upon appeal before the return of the writ.

2. Resolution. That upon a plea of *non cepit* the defendant shall be bailed. In *Keilw.* 71. a. and *Fitzh. nat. bre.* 74. e. it is resolved, that after an *elongat.* returned the defendant may plead *non cepit*; (and there is no difference between a *homine replegiando* and a common replevin of cattle) and the reason is, because the sheriff cannot make a return, but that the cattle are eloined, or that no person came to shew, &c. or a delivery; but he cannot return, that the defendant *non cepit* the cattle, because it is supposed in the writ, and is the ground of it, which the sheriff cannot falsify, and therefore case does not lie against the sheriff for a false return, if he makes such a return; and for the same reason the defendant shall not be concluded by it, but when he comes, and denies the return by plea of *non cepit*, his denial shall be as good as the surmise of the writ, and rather better, because the proof is incumbent upon the plaintiff. And then what reason is there, that the defendant should not be bailed. Upon a plea of *non cepit* the defendant shall be bailed, if he be taken upon a *capias in withernam*; if he appears at the return of the *homine replegiando*, he shall not put in bail. Returns in replevin. Case for false return.

not be bailed, when the matter stands indifferent; since the lord Coke upon *Westm. 1. cap. 15.* which statute prescribes in what cases men are bailable, makes this rule, that the party *flat' indifferenter*. And Holt chief justice said, that the plaintiff's counsel took the return to be a conviction, as it was taken in the case of the lord Grey, who coming into court upon the return of an *elongat.* was for that reason committed and detained in prison fifteen days; but Holt said, that he never thought the said proceeding legal, because the sheriff could not make other return, and the suggestion of the writ is but bare surmise; and it has been resolved here, that the defendant may appear and plead *non cepit* after the return of an *elongatus.* Then it will be considerable, *quid operatur* the awarding of the *withernam.* If *elongatus* be returned, and the defendant comes in, and pleads *non cepit*, this supercedes any *withernam*, and the return of the *elongatus* is as strong before the award of the *withernam* as after, and the award of it does make the return stronger, being but the natural consequence of the return of an *elongatus.* The *withernam* is but *mesne* process, and cannot be an execution, because it is granted before judgment. The intent of the suit is to recover damages, and if it be found against the defendant, by a new *capias in withernam* by way of execution he may be imprisoned for ever. But this court cannot convert *mesne* process into execution. In replevin for cattle with *ad hoc detinet*, damages given for the cattle will change the property; but liberty is not estimable, and therefore will alter the case. 11 Hen. 4. 10. 7 Edw. 4. 15. If upon an *elongata* returned the defendant's cattle are taken in *withernam*, yet upon the defendant's appearance, and pleading *non cepit*, or claiming property, the defendant shall have his cattle again, and if they are eloined, a *withernam* against the plaintiff. For if the property, or taking, be in question, there is no reason, that the plaintiff should have the defendant's cattle. In the same manner there is not any reason, that the defendant should continue in prison. If an *elongatus* be returned to a *homine replegiando*, and the defendant comes in, and pleads *non cepit*, he shall not give bail, but shall be in court without bail; but if he is brought into court in custody upon the *withernam*, then he must put in bail, which is but a continuance of the former taking; and so it was in the case of *De La Bastine.* The case of *Designy*, Raym. 474. is an odd incoherent case; and Holt said, that he was sorry, that the said case was reported, but that it was reported truly as it was, for if the court could not bail him, how could the court take a sum of money to be deposited for his liberty? As to the objection made by Mr. Cowper, that there is a writ in the *Regist.* 79. a. where the lord of a villain being taken upon *withernam* brought a writ directed to the sheriff commanding him to bail him upon delivery of the plaintiff; and therefore that the defendant ought

ought to lie in custody, until he has delivered the plaintiff. Holt answered, that the said writ was for the benefit of the lord, who was taken in *withernam*, to empower the sheriff to bail him before the return of the writ, by reason of the long return that such writ might have, and perhaps the defendant in this case might have such a writ, but that is not a precedent to guide the course of this court. But he was of opinion that the said case was not like the present case, for here when the defendant pleads *non cepit*, and denies the taking, which is a bar of the replevin, he ought to be delivered; but there by his claim of property he admitted the taking; besides, that it is an authority so far for the opinion of the court at present, that as the villain should not be detained in custody upon the supposal of property in the lord, so when the defendant in the replevin denies the taking, he ought not to remain in custody upon the bare supposal of the writ. A question has been made, whether the plaintiff could have another *withernam*, if the court should bail the defendant upon this. Suppose he could not; if a *homine re-* Proceedings
upon a *homine*
replegiando.
replegiando be brought, it is a good return, that the defendant claims him as villain, but upon the return of the writ to the court if any persons come into the court and give security to have the plaintiff in court at a day certain, a writ shall issue to the sheriff to deliver the plaintiff, and upon the coming of the plaintiff into court at the day, he shall give new security, to appear in court *de die in diem* until the plea be determined, and if judgment shall be against him, then his bail to bring him in and deliver him to the defendant; and if he cannot find such bail, then he shall be committed to the custody of the marshal, and at the end of the suit shall be brought by him into court and delivered to the defendant. 8 Hen. 4. 2. Fitzb. mainprise, 23. And the said bail is but for ease of the custody. But if judgment be given against the defendant, then his bail shall render him in custody again, and then he is in upon the former *withernam*. And he likened it to the case where a man in execution brings an *audita querela* upon a deed, or for nonage, and is bailed, and judgment being against him, is rendered into custody, he is in upon the former judgment. But then the question is, that if he should not be rendered, whether this court can award a new *withernam*. And as to that he likened it to the case, where a man is bailed to appear *de die in diem* upon an appeal of murder, if the defendant makes default, process shall issue against the bail, and a *capias* against him, and if he renders himself, he shall be in upon the appeal. If the defendant be in upon the *elongatus* returned, and pleads *non cepit*, and the issue be for the plaintiff, the judgment shall be the same; but a *withernam* shall be awarded, because the plea of *non cepit* was a suspension of the award of the *withernam*, and therefore the said suspension being taken away, a *withernam* ought to issue. As where an inquisition upon

Proceedings
upon *Westm.*
2. cap. 46.

439, 580.

1 Sid. 107.

upon the statute of *Westm.* 2. cap. 46. is returned, and a *disfringas* issues to inquire, who were the malefactors, and which are the adjacent towns, and what damages the party hath sustained, and to distrain the towns to re-erect the hedges and ditches, and to levy the damages; which proceeding was invented by Mr. Noy, of which there is a case *Cro. Car.* 280. notwithstanding that this resembles an execution, and is intended only to levy the damages, &c. yet it gives a day to the parties to appear and plead and traverse the matter; and if they come not in, then a *disfringas in infinitum* issues; but if they come in, that stops the proceedings; but when the plea, &c. is determined upon issue or demurrer, they are revived. So if the defendant pleads *non cepit*, before a *withernam* be awarded, that stops the awarding of it; but after such plea is determined, all is at liberty again, to award a *withernam*. *Holt* chief justice confessed, that he did not know any precedent for such a proceeding, but that it is agreeable to the reason of the common law. If the bail do not render the defendant, they will forfeit their recognisance, and a new *withernam* will issue, as a new *capias* in the case of an appeal aforesaid. The bail here is but an ease of the former custody, and when the defendant is rendered, he shall be in custody *ab initio*. And *per Holt*, there is no reason, why the defendant should not have his liberty pending the suit, as well as the plaintiff.

Gager deliverance.

3. It was prayed by the counsel, that the defendant might wage deliverance; and *Old Entr.* 94. was cited. But it was resolved, that when the defendant pleads *non cepit*, he shall not wage deliverance, because he cannot deliver, whom he never took.

Condition of
the recogni-
sance of bail
in *homine re-
plegiando*.

4. Resolution. That the bail ought to be bound in a sum certain, with condition that the defendant shall appear *de die in diem*; and if judgment be against him, that they shall render his body in *withernam ibidem remansurum, quousque* he render the party, and suffer him to go at large.

The plaintiff
is demandable
at the return
of the *capias*
in *withernam*
after a *homine re-
plegiando*,
and if he does
not appear he
shall be non-
suit.

But then the opinion of the court being, that the defendant could not be bailed, until after he had pleaded *non cepit*; the plaintiff refusing to declare, the question was, whether he was demandable upon the *withernam* or not. And *Holt* chief justice delivered the opinion of the court, and said, that whensoever a writ is awarded, that is returnable, the day of the return is always a day to both parties to appear, and though the writ be returned not served, yet the defendant may appear, to prevent any ill consequence. The next adjacent towns, in the case aforesaid, have no day upon the *disfringas* to appear, it being only for levying the damages, &c. as aforesaid, and yet they may appear, and the prosecutor must appear

appear of necessity, though no day is given to either party upon the *distringas*. The plaintiff has no day in any case upon the writ. In case of appeal neither the plaintiff nor defendant have any day in court, the proceedings at a gaol-delivery being discontinued by the *certiorari*. But here there is a day in court upon the return of the *withernam*, for the said day is a day for the defendant as well as for the attorney of the plaintiff. What day has a man upon a common replevin? The *pluries* replevin supercedes the proceedings of the sheriff, and the proceedings are upon that, and not upon the plaint, as they are when that is removed by *recordari*. Though there is neither summons nor attachment in the writ, yet without doubt the defendant has a good day in court; like the common case of replevins, though there is no summons in the writ, yet it gives a good day to the defendant to appear, and if he does not appear, then a *pone* issues, and then a *capias*. The entries in *Rastal*, &c. that the defendant *attachiatus est ad respondendum*, &c. *de placito quare cepit*, &c. are made in such manner, because in consequence of law it is an attachment, the defendant being obliged to appear upon the peril of a *withernam*. But he said that he wished, the record were made in this manner, beginning, *Dominus rex mandavit*, &c. and so to shew the replevin, and the *withernam*, and then all the proceedings would appear, as *Rast.* 560. in the case of a common replevin. And it is like the course in the King's Bench, to recite writs in such manner; but in the Common Pleas only the substance of it. And as to the objection made by the counsel, that it was absurd to imagine, that the plaintiff could make an attorney, when he was eloined, &c. *Holt* chief justice answered, that the same persons, who sued this writ in the name of the plaintiff, might make an attorney for him, and that is the constant course. But it would be a very strange thing, if the plaintiff should not be demandable; for then a man might run away, and a *homine replegiando* might be sued against *J. S.* for a supposed taking, &c. of the man, and *J. S.* upon this would be kept in prison for ever. And the court exhorted the plaintiff's counsel to declare, &c. which they refused; upon which the court in anger rebuked them, and said, that they did it only to embarrass the court. But however they would not declare. Upon which, the plaintiff, being demanded and not appearing, was nonsuit. Note, That Sir *Bartholomew Shower* cited two cases, where men had been bailed upon a *withernam*, *Mich.* 5 *Hen.* 4. *Rot.* 25. *Hil.* 16 *Ric.* 2. *Rot.* 16. *Ex relatione m'ri Jacob.*

Day upon replevin.

Post.

Entries of writs in the King's Bench at large.

Rex vers. Fowler.

S. C. 1 Salk.
390.

Ante 586.

Excommuni-
cation in qui-
busdam causis
subtractionis
decimarum sive
aliorum ju-
rium ecclesia-
sticorum.

UPON a *habeas corpus* directed to the sheriff, to bring the body of Fowler, &c. he returned, that Fowler was taken upon a writ of *excommunicato capiendo*; and upon the recital of the writ in the return it appeared to be in the disjunctive, *viz. in quibusdam causis subtractionis decimarum sive aliorum jurium ecclesiasticorum*. And because the case was uncertainly shewn in the writ, it was moved that Fowler should be discharged. And 8 Co. 68. Trollop's case, and Fitz. nat. bre. 64. were cited, that a certificate of an excommunication was ill, if it did not express the cause in certain; for perhaps the *alia jura ecclesiastica* may be matters of which they have not conusance.

Holt chief justice said, that the rule without doubt is good, that sufficient cause ought to appear in certain, because the king's courts are judges of their jurisdiction, and not themselves, and therefore they ought to shew, that the matter was within their conusance. And for the same reason doubtless the *significavit* is ill, and therefore the defendant may in Chancery procure the writ to be superseded. But the King's Bench cannot deliver a man arrested upon the King's writ, because the Chancery has granted it where they ought not to have granted it. If the certificate be ill, the Chancery ought to supersede it; but the King's Bench cannot proceed upon it, because it is not before the King's Bench; for the King's Bench cannot give judgment upon a recital, where another court is possessed of the original. In error brought upon a judgment of the Common Pleas in debt, an exception was taken, because the writ, as it was recited in the declaration, was *attachiatus*, where it ought to have been *summonitus*, and therefore ill; but the court refused to allow the exception to be taken, because the writ was not before the King's Bench, but only by recital; but it was held, that dimunition ought to be alleged, and a *certiorari* sued; and if upon that an original was returned which was *attachiatus*, the judgment should be reversed.

But then the grand question was, whether this uncertainty in expressing the cause would vitiate the writ, and then whether the court would quash it? And in proof of the affirmative, Moor pl. 667. Cro. Jac. 566. Cro. Car. 196, 199. W. Jones 226. Hil. 29 & 30 Car. 2. B. R. Rex v. Price, it was agreed, that justice ought to be done here upon the writ. 1 Roll. Rep. 136. T. Jones 89. were cited.

After several arguments at different days, and upon great consideration and search of precedents, it was resolved, that the writ should be quashed, and a *superfedeas* issue. And Holt chief justice said, that at common law the cause had no need to be shewn in the writ of *excommunicato capiendo*; but it was sufficient to say, that the party was excommunicate *pro contumacia manifesta*. Regist. 65, 7. But in the *significavit* it ought to be shewn. Fitz. nat. bre. 63, 4. And now since 5 Eliz. cap. 23. the cause ought to be shewn in the writ. And he said, he had searched many precedents upon the rolls in the Crown-office, from the 8 Eliz. to this time, and there are some precedents where the cause is omitted, but the cause is mentioned in the greatest part. In 8 Eliz. rot. 20. there are five writs which are general *pro contumacia*. In 15 Eliz. rot. 54. there are two with cause. In 17 Jac. 1. rot. 54. there is one without cause, and another with the cause. In the time of King Charles II. there is one the same with this here, and another, *aliorumque*, and one upon the same roll, *decimarum* only. And though in several of the said precedents the cause is not well shewn, yet its being shewn in some manner, shews the opinion of the courts to have been, that the statute had made some alteration; and therefore at this day cause ought to be shewn. And that is agreeable to reason; for when the statute makes the writ returnable here, it is on purpose that this court should judge of the cause; otherwise it had been idle to make the writ returnable here, and especially when the process ought to differ according to the difference of the cause for which the excommunication was. As to the nine causes mentioned in the act, an *alias* ought to issue with a penalty, &c. Then this court being possessed of the writ, and it not expressing the cause specially, but in the disjunctive, the writ ought to be quashed. Before this statute they ought to have resorted to the Chancery, and procured a *superfedeas* there, 2 Inst. 623. But that cannot be done now, because the writ is returnable here. But because the cause is shewn insufficiently out of the writ, it ought to be quashed, and a *superfedeas* awarded. But a *habeas corpus* is a very improper method to discharge the party, for he is well arrested by virtue of the King's writ, and cannot be discharged whilst that is in force. And it is a good return to the *habeas corpus*, that he is in custody by writ of *excommunicato capiendo*.

Gould justice said, that before the 5 Eliz. cap. 23. this court could not discharge a man taken upon an *excommunicato capiendo*, unless he was excommunicated pending a prohibition. And he agreed, that this court had power to quash the writ, and award a *superfedeas*, where the cause is not sufficiently expressed; but he made a doubt, whether there was here any such uncertainty; for the *five* seemed to him to be accumulative.

But

Writs of ex-
communicato
capiendo
quashed for
uncertainty.

But by the opinion of *Holt* and *Tarton* justices the writ was quashed, and a *superfedeas* granted. And *Holt* ordered the clerk to enter upon the *babeas corpus*, that the party was discharged, because the writ was quashed. And *Holt* said in this case, that if the writ had been, in *causa subtractionis quorundam jurium ecclesiasticorum*, it had been well. The same law if it had been, *et aliorum*, or *aliorumque*. But he said also, that this statute was not well understood until the time of *Charles I.* in *Hughes's* case, *Cro. Car.* 196. He said also, that the form of the proceedings in the spiritual court ought to be regarded; as in a libel for words, their form is to say, that he spoke such words, *aut alia similia*, and yet a prohibition was denied to be granted for the said cause.

Cousin's case.

In *Trinity* term following *Cousins* was brought up on a *babeas corpus*, and the return was, that he was arrested upon an *excommunicato capiendo*. And there was a fatal exception to the writ for the uncertainty of the cause (it being *pro non reparatione sortis suae munimentorum coemeterii de B.* which was agreed by the court to be uncertain and bad) and yet they would not discharge him upon the *babeas corpus*, but compelled him to procure the writ to be returned. And then they deferred to quash the writ, because the defendant was not present in court, as he ought to be. *Ex relatione m'ri Jacob.*

Harman *vers.* Owden.

Assumpsit.

S. C. 1 Saik.
140.
S. C. 12 Mod.
421.
Uncertainty.
S. C. Comyns
89.

THE plaintiff declares, that the defendant in consideration of 20*l.* paid to him by the plaintiff, assumed to deliver to the plaintiff at or before the eighth of *January* forty-five quarters of oatmeal, *et sex cribra avenacea*, *Anglice* oatmeal splitted and hair sieves, and a fan, out of a ship into a barge to be brought there by the plaintiff for the said purpose; and he avers, that upon the eighth of *January* he brought there his barge, and the defendant *non deliberavit* upon the eighth of *January*, &c. Upon *non assumpsit* pleaded, verdict for the plaintiff. And Mr. *Cowper* moved in arrest of judgment, 1. That the sieves being of divers sorts, the plaintiff should have shewn how many of each sort were to have been delivered. To which Mr. *Broderick* answered, that in trespass or trover this might have been a good exception, but not in *assumpsit*, where we ought to declare as the agreement was. And *Holt* chief justice said, that if the agreement was such, this uncertainty could not vitiate it; but the defendant has his election, how many

many of each of them he will deliver. Suppose the agreement was, to deliver six cows and calves; the plaintiff ought to have six of each of them. But besides, it does not appear here, but that they might be the same. 2. The second exception was to the breach, that it was not well assigned, the promise being to deliver at or before the eighth of *January*, and the breach is assigned, that he did not deliver upon the eighth day of *January*; so that he might have delivered them before, which would have been a good performance of the agreement. But after consideration had of this Breach. exception, *Holt* chief justice delivered the opinion of the court, that the plaintiff ought to have judgment after verdict. But (by him) it would have been good without verdict; for when the promise was, to deliver the things out of a ship into a barge, to be brought by the plaintiff on or before, &c. and the plaintiff says only, that he did not deliver upon the day, and not that he did not deliver before, yet in such a case as this it will be well enough. For though the defendant has his election, to deliver before, &c. yet there ought to be a concurrence of the plaintiff, and he ought to be ready to accept them; for the defendant cannot make a tender before the last day, to oblige the plaintiff to accept them; and if he comes before the last day to make a tender, that will not excuse him from making a tender or delivery of the goods upon the last day, according to 3 *Cro.* 14, 73. where a place is appointed for payment of money. For if the plaintiff be not ready there with his barge, the tender will not be sufficient. And therefore since the last day is the time appointed by the law, when the one is obliged to deliver, and the other to receive, it will not be presumed, that the plaintiff was there before with his barge ready to receive them. But however, it is aided by the verdict; for if there had been an actual delivery, the jury could not have found for the plaintiff; for at this time performance is given in evidence upon *non assumpsit*; and if the defendant had delivered the goods, it had been *non assumpsit*; and therefore no delivery being proved, they gave a verdict for the plaintiff. And judgment was entred for the plaintiff. *Holt* cited 2 *Saund.* 350. *Peter's v. Opie.* 1 *Sid.* 15. 1 *Saund.* 228. 1 *Ventr.* 119. *Ex relatione m'ri Jacob.*

Memorandum, That Sir George Treby knight, lord chief justice of the Common Pleas, died the thirteenth of December in this vacation of an asthma at Kensington Gravel pits.

7 T

Hilary

Hilary Term

12 Will. 3. 1700-1. B. R.

Sir John Holt Chief Justice.

Sir John Turton

*Sir Littleton Powys removed
out of the Exchequer the
twenty-eighth of January in
this term.*

Justices.

Sir Henry Gould

*Memorandum, That Mr. serjeant Bury was made a baron of the
Exchequer the twenty-eighth of January in the room of Mr. baron
Powys removed into the King's Bench.*

*Memorandum, Mr. serjeant Whitaker was sworn one of the
King's serjeants the eleventh of February in this term.*

*Memorandum, That Mr. serjeant Levinz died the twenty-ninth of
January in this term at Serjeants Inn in Fleetstreet.*

S. C. 1 Salk.

391.

Lilly's Entr.

205.

S. C. 1 Wms.

14.

S. C. Comyns

88.

3 Salk 206.

S. C. 12 Mod.

296.

Surrender to

B. C. and D.

equally to be

divided among

them.

Fisher vers. Wigg.

Intr. Trin. 11 Will. 3. B. R. Rot. 156.

IN ejectment the matter in law in question was thus. A copyholder seised of customary lands in fee at the will of the lord, &c. according to the custom of the manor, surrendered them, &c. to the use of his wife for life, and after her decease to the use of B. C. D. E. and F. his children, equally to be divided among them, and their respective heirs and assigns for ever. And they were

were admitted accordingly. And the question was, whether *B. C. D. E. and F.* were by virtue of this surrender jointenants or tenants in common. If they were jointenants, then judgment ought to be given for the defendant; but if they were tenants in common, then it ought to be given for the plaintiff.

And this case was argued several times at the bar by Mr. *Cartwright* and Mr. *Peere Williams* for the plaintiff, and by Mr. *Northey* and Mr. *Broderick* for the defendant. And now this term the judges, viz. *Holt* chief justice, and *Turton* and *Gould* justices, (*Powys* justice not having yet taken his place) delivered their opinions, viz. *Turton* and *Gould* for the plaintiff, and *Holt* chief justice for the defendant. And *Gould* justice argued, that judgment ought to be entred for the plaintiff, because the children (by him) were tenants in common. And he said, that the question arose upon these words [equally to be divided among them, and their respective heirs and assigns for ever.] And in pronouncing his opinion, he said, he would pursue the same rules with *Richardson* chief justice in *Beck's* case. *Littlel. Rep.* 344, 5. that in exposition of deeds all parts of them ought to stand, and to have effect, if they can; and that the parties intention ought to be pursued, unless such exposition would contradict the known rules of law. He could not find any express authority, where this point hath been settled; but the force of the authorities in the books seem to warrant his opinion. The present question does not depend upon words which will create an estate, but which ought to qualify an estate; and in such cases the intent of the parties ought to be pursued. There are no particular words necessary to create a tenancy in common. *Littlel. sect.* 292, 298. *Co. Li.* 189. a. In the cases of frank marriage, and exchange, there are necessary words of art in the creation of them, which cannot be omitted; but in cases of tenancies in common no such precise words are requisite; for if they divide the estate, and shew that a several property was designed to each party, it is sufficient. For the making of a tenancy in common does not add to the estate, but qualifies it; as in the creation of an estate in fee-simple, it is necessary to add the word heirs, but tenants in common may release to one another without it. A joint estate in the premises may be altered in the *habendum*. As *Hob.* 172. lands are given to two, *habendum*, the one moiety to one, the other to the other, they are tenants in common; and there is no other reason for it, but because the *habendum* shews the intention of the parties, that they should have several interests. If *A.* gives lands to *B.* and his heirs, *habendum* to him and his heirs, it is a fee; but if he goes on and says, that if *B.* dies without issue, the remainder to *C.* &c. it is tail, because the latter words correct the former. *Plowd.* 541. *Littlel.* 345. Then
if

if no precise form of words is necessary, his intent is apparent, to be an estate in common, because it was designed as a provision for his younger children. There was a case in the Common Pleas *Paschae* the sixth of this King between *Blisset v. Cranwell*, where a devise to T. and R. and their heirs, and the survivor of them, equally to be divided between them after the death of the wife, &c. was held a tenancy in common; but the question in the court was, because this seemed repugnant to the former part of the devise; but it was held by the whole court, that the last words distributed the estate. [Note, this point was made at the trial before *Treby* chief justice, and was referred to him, and he prayed the opinion of the other judges of the Common Pleas, and it was argued at the bar there, and it was adjudged *Paschae* 6 Will. 3 Mar. C. B. by *Treby* chief justice, *Nevill* and *Rokeby* justices, that it was a tenancy in common, but *Powell* justice held it to be a jointenancy. *Ex relatione m'ri Place.*] As the law is now held, these words will make a tenancy in common in a will. Then in this case the intent of the parties appearing to be, that they should have it in common, that ought to be pursued as far it can. But moreover this case is of a use, which resembles that of a will. The case of *Brookes v. Brookes*, 2 Roll. Abr. 67. is a strong case, where a copyholder surrendered his copyhold to the lord, without limiting a use, and afterwards the lord *concessit seisinam* of the copyhold to the tenant, *habendum* to him and his wife and the heirs of their two bodies; and there though the wife was named only in the *habendum*, it was held, that she would take an estate-tail; in a common case it would have been ill, because she was not named in the premises; but the intent of the surrender was taken in the said case to have been to the said uses, and therefore the manner of the grant was not material, it being only an explanation of the surrender. Now this case is stronger, because it is the express limitation of the uses upon the surrender. And it was also held in the said case, that the surrender of a copyhold shall be expounded according to the intent, as a will. The cases of grants *in futuro* are ill, because they are repugnant to the rules of law; but that case of a use was held good, though it was contrary to the known rules of law. He said, he could not shew any case, where this point has been solemnly adjudged, but there are parallel cases. The case of *Smith v. Johnson*, *Pasch.* 32 Car. 2. was the case in point, but no judgment was entred upon the roll; the case was, a feoffment to two and their heirs, equally to be divided between them, to the use of them and their heirs; upon the breaking of the case *Scroggs* chief justice and *Dolben* justice were of opinion, that it was a tenancy in common, but *Jones* justice was of another opinion, upon the difference objected here between a deed and a will. So *Co. Li.* 190. b. if a verdict finds, that

S. C. 3 Lev.
373.

Intr. Pasch.

32 Car 2.

B. R. Rot.

564.

Cases in B. R.

187.

that a man hath *duas partes manerii in tres partes dividendi*, they are by the intendment of the verdict tenants in common. Besides, that if these words will not make a tenancy in common in this case, they will be vain, and must be totally rejected. In the case of *Whorewood v. Shaw*, *Yelv.* 23. *Cro. Eliz.* 729. *Moor* 667. *Owen* 127. where a man by his deed acknowledged to have received of *J. S.* 40*l.* to be equally divided between *A.* and *B.* and to their use; this was held a creation of a several debt of 20*l.* to each of them, being in the case of a personal duty; but *Yelverton* says, that it is not like the cases of interest, where land or a lease is given to two equally to be divided between them, for there they are tenants in common; and he makes no difference between a deed and a will. There has been a notion of a distinction between deeds and wills, and the said distinction is taken in the case of *Lewen v. Cox*, 3 *Cro.* 695. by *Coke* then attorney general. He said, he did not know, that the said point had ever been debated. So in the case of *Furse v. Weeks*, 2 *Roll. Abr.* 90. and *Stile* 211. the same distinction is taken by lord *Rolle*, but it is only an opinion of his *obiter*; and farther, it differs from this case, because this case is of a use, that of a grant or feoffment, which is a conveyance at common law, but uses are governed by the intent of the parties, and ought to be maintained, if they can possibly. These words import something more than ordinary, and therefore the intent seeming to him to be uncontrovertible, he was of opinion, that the plaintiff ought to have judgment.

Turton justice argued also of the same side for the plaintiff, and much to the same purpose. But he added these reasons also, why the intent of the surrenderor should be taken to be, to create a tenancy in common; because if any of the five should die without issue, his part would descend to the eldest son; if they had issue this would be a provision for their families, which might be the sole reason that prevailed with the surrenderor, to give it away from his eldest son, and of consequence he would not remove it from his eldest son any longer than the said reason continued. He cited also several cases of wills, where words less significant had been construed to make a tenancy in common. *Cro. Eliz.* 695. *Lewen v. Cox*. Devise to his two sons equally and their heirs, tenancy in common. 3 *Co.* 39. *b. Ratcliffe's case*. The words, equally to be divided, in a will, tenancy in common. The same law of the words, part and part alike, *Cro. Car.* 75. *Thoroughgood* *Lit. Rep.* 45. and *Jaques v. Collins*. *Stile* 434. *Torret v. Frampton*. Devise to *A.* for life, remainder to *B. C.* and *D.* and their heirs respectively for ever, *B. C.* and *D.* were tenants in common. And from thence he inferred, that these words being stronger would make a tenancy in common in a deed. He cited the case in *Littlel. sect.* 298.

Surrenders of
copyholds
ought to be
construed fa-
vourably.

298. where lands are given to two, *habendum et tenendum, scilicet* the one moiety to the one and his heirs, and the other moiety to the other and his heirs; they are tenants in common. And from thence he urged, that in regard no particular words were required by law to create a tenancy in common; the words in the present case, having the same sense and import with those in the case in *Littleton*, ought to make a tenancy in common. He said also, that if this case had been before the statute of uses, it would have been taken in equity according to the intent of the surrenderor, to be a tenancy in common; and now since the statute has executed the use into possession, it ought to have the same construction in a court of law, that it would have had before the said statute in a court of equity. Then he cited cases, to prove, that surrenders ought to be construed favourably, and had been oftentimes taken contrary to the rules concerning conveyances at common law; and that they ought to be taken so, in regard that they are considerable as wills, because oftentimes made by the surrenderor *in extremis*, when he is *inops consilii*. And therefore he cited *Cro. Jac.* 434. *2 Roll. Abr.* 67. *Brookes v. Brookes*, and also *1 Saund.* 151. *Wade v. Bache*, where a copyholder in remainder surrendered his remainder to the use of the tenant for life, and after his death to the use of himself and his wife, &c. and though the limitation for the life of the tenant for life was void, and so by consequence by the common law the remainder would have been void also; yet it was held, that in case of a copyhold it should be taken as a mediate settlement upon the husband and wife after the death of the copyholder for life. He cited *2 Ventr.* 367. in Chancery, where a covenant to stand seised to the use of *A.* for life, and afterwards to two, equally to be divided, and their heirs and assigns for ever, was adjudged by the lord keeper *North*, to be a tenancy in common. And for these reasons he was of opinion, that judgment ought to be given for the plaintiff.

Holt chief justice *e contra* argued for the defendant, that this was a jointtenancy. And he made two points, 1. Whether these words would make a tenancy in common in any deed. 2. Whether this case shall have a more favourable construction, because it is in case of a copyhold, or because it is a conveyance by way of use. And he gave his opinion to the second point first; that as to the raising and passing estates, copyholds ought to be governed by the rules of the common law. *4 Co.* 29. *b.* And as to *Brooke's* case, *Poph.* 125. *2 Roll. Abr.* 67. and the saying in *Popham*, that the case of a copyhold resembles the case of a will; the report in *Cro. Jac.* 434. makes no mention of any such thing; and the said part of *Popham's Reports* being reported by an uncertain author, ought not to be regarded. But however he held as to the said case,

Poph. 39.
Cro. Car. 366.
Cro. Jac. 376.
2 Bullstr. 272.
Cro. Eliz. 29.

case, that if a copyholder surrenders to the lord, without limiting any use; the copyhold belongs to the lord, and his estate is extinguished, in the same manner as if tenant for life at common law releases to him in reversion; and then the grant will be a voluntary grant of the lord; and then the resolution of the said case will be no more, than that it is a custom for copyhold estates to pass in the said manner; and if many grants have been made in the said manner, such grants will be good. And he said, he knew manors, where grants have been made to *R. habendum* to *A. B. C. and D.* the first named took the whole for his life, and so every one in remainder in their order. And as to the matter of the use, upon which his brother *Gould* insisted, there is no such thing, but it is only a direction of the surrender; for the person, to the use of whom the surrender is made, is not *cestuy que use* in the mean time, but when the surrenderee is admitted, he is in by the grant of the lord. And for these reasons he was of opinion, that this case ought to be considered but as a grant at common law. And then he held, that the five children were joint-tenants. 1. Because if these words have any signification, yet it is no more, than what would have been implied in the nature of the thing, if they had been omitted, and therefore no regard shall be had to them. For if an estate be made to five persons, each of them has an equal proportion, and the words, equally to be divided, mean only, that each of them shall have a fifth part, which they have by the conveyance. In *Co. Lit.* 186. *a.* where all the authorities are enumerated in the margin, it appears, that joint-tenants have but their part, to alien or forfeit; and therefore though it is said, that jointenants are seised *per my et per tout*, yet every one of them has but his part for disposal; if they join in a feoffment, it ought to be pleaded as the feoffment of both, and the feoffee after the death of one of them, cannot plead, that he is in from the survivor. Then if each of them has his part, these words signify nothing. One may ask then, what is the difference between jointenants and tenants in common? *Littleton*, *sect.* 292. shews it, *viz.* these latter come in by several titles, but the former by a joint title. But there is an exception to this in the case of a gift made to a corporation and a natural person jointly, they shall be tenants in common, because they have several rights, which cannot stand in jointure. But whensoever they may hold in jointure, they shall be jointenants. However there is no difference as to the taking of the profits; for if one tenant in common takes all the profits, his companion has no remedy against him. At common law none of them could have been obliged to make partition. And how then will these words, equally to be divided, make any difference, when any one of the jointenants might dispose of his part, and when they take the profits alike in both cases? So that it is the same

Surrender to
A. habendum
to A. B. C.
and D.

Feoffment of
twenty acres,
habendum ten
acres to *A.*
and ten acres
to *B.*

same thing, whether these words be inserted or omitted. As to the other words, and to their heirs respectively, they will make no difference; for an estate to two and their heirs, and to two and their heirs respectively, makes no difference; for the limitation must be to the heirs of both to make a jointenancy, and then the word heirs respects both parties, which is the whole meaning of their heirs respectively, and so no more, than what is in every jointenancy. And then according to *Davenport's case*, 8 Co. 145. a. if words are inserted in a grant, which signify nothing, they will make no difference in the construction of it. As to the objection of *Littleton*, sect. 298. if lands are given to two, *habendum et tenendum, scilicet*, the one moiety to one and his heirs, and the other moiety to the other and his heirs, they are tenants in common, and yet it is but one conveyance; and then here the words, equally to be divided are tantamount to those of, one moiety, &c. He answered, 1. That he held, that it was not one conveyance only, but several conveyances, though but in one deed; for if such estate be made by deed of feoffment, there must be two liveries; for livery of the one moiety to the one tenant in common will not avail the other, because they have several freeholds. And then it cannot be one conveyance, because several liveries must be made upon it, and then it is within the rule. 2. The words are not of like import, for these words make no distribution of the estate, as those others do, by confining each of them to a moiety; but the words, equally to be divided, import no such thing. As to the case of a moiety to the one and his heirs, &c. that is a tenancy in common, because it is an undivided moiety, and so proper. But if a feoffment was made of twenty acres, *habendum* ten acres to *A.* and ten acres to *B.* they are several tenants, and not tenants in common. There they are two conveyances, but here the words consist as well with jointenancy as with tenancy in common, and therefore to construe them to make a tenancy in common, is to restrain them within a narrower compass, than they import of themselves. 2. These words cannot make a tenancy in common, because a tenant in common has an estate undivided, but the words here say, that the estate ought to be equally divided, which cannot make a man tenant *pro indiviso*, but differ from it, as much as divisible differs from indivisible. And when according to *Littleton*, sect. 292. the nature of tenants in common is, that none of them knoweth thereof his severalty, but they ought by the law to occupy such lands in common, and *pro indiviso*; these words can never create such an estate; but if they signify any thing, it must be, that the grantees shall not take, until the estate be first divided. In *Co. intr. tit. partition* 413. the writs of partition upon the statute of *Henry 8.* make no mention, whether the parties be seised jointly or in common, but say only, that they hold such lands, &c. *in-
simul*

simul et pro indiviso. And when as well jointenants as tenants in common hold so, the words, equally to be divided, cannot confine it more to one estate than to the other. As to the case in *Co. Lit.* 190. *b.* that if a verdict finds, that a man hath *duas partes unius manerii in tres partes dividendi*, that by the intendment of the verdict, this is a tenancy in common; he observed, that the said case is not positive, but *Coke* says, it seems to be so; and the opinion is not warranted by 21 *Edw.* 4. 22. cited in the margin, nor was it in the case; for there in a writ of entry upon the statute of *Richard 2.* &c. the defendant pleaded, *non intravit contra formam statuti*, upon which issue was joined; and the jury found, that the defendant entred into two parts of the manor in three parts divided; and it was moved in arrest of judgment, that by the intendment of the verdict the plaintiff and defendant ought to be intended tenants in common, and then the action would not lie; but the court *contra*, and the plaintiff had his judgment. But suppose it should be taken to be so upon the verdict of a jury, when it stands *indifferenter*; that will differ much from this case. But all that *Coke* intended by the said case was, that two parts of a manor in three parts divided cannot be intended tenancy in common, because they were actually divided, and held in severalty (like as it would be, if the lord of a manor should lease the third part of his manor, and then *A.* entred upon the other two parts, and the lord brought the action, and declared of an entry upon the intire manor, yet the jury could not find an entry, but of the two parts.) But *in tres partes dividendi* might intend a tenancy in common, because *dividendi* argues a common possession, in regard that it is not yet divided, but remains to be divided, and therefore at this time must be a common possession. But notwithstanding that the possession is in common, it may be as well coparcenary, or jointenancy, as tenancy in common. And then how can it be a tenancy in common, since if the import of the words were executed, the estate ought to be divided, and then it cannot be tenancy in common? Then he considered the agreement between jointenancy and tenancy in common. The possession of one tenant in common is the possession of the other. *Hob.* 128. *Small v. Dale.* *Moor* 868. But it may be objected, that they have several freeholds. *Co. Lit.* 200. but the estate is not divided, but they are several freeholds in undivided parts, and so these words, equally to be divided, cannot be of effect, being contrary to the very nature and essence of a tenancy in common. As to the objection, that these words in a will would have made a tenancy in common. 3 *Co.* 39. *b.* he agreed it; but he said, that was no rule to construe them accordingly in a deed. For 1. There is a great difference between wills and conveyances made in a man's lifetime; the same words in the one will have a different construction

from what they will have in the other; as a limitation to a man and his assigns for ever is but an estate for life in a deed, but in a will it is an estate in fee. In 27 Hen. 8. 27. a. by *Fitzherbert* and *Shelley*, if lands are devised to a man and his heirs males, it is tail; in a deed it will be otherwise. And the reason of the difference is, that where lands are devisable, the law considers the circumstances under which the devisor is, that he is *inops consilii*, &c. and therefore will pursue his apparent intent; and this was at common law, where lands were devisable by custom. 27 Hen. 8. 27. a. 11 Hen. 6. 12, 13.

2. He considered the precise reason of this judgment in the case of a will, for the reason of the judgment is the strength of the authority. *Ratcliffe's* case does not say, that these words equally to be divided make a tenancy in common by force of the words, but because they manifest the intent of the devisor, that the estate shall be divided, and consequently that there shall be no survivor. Now estates in a will may be governed by an implication upon the intent of the devisor. 13 Hen. 7. 17. and *Hob. 34. Counden v. Clerke*, where *A.* by his will made *J. S.* his heir; though in strictness that could not be done, yet it passed a fee by the intent. But in *Cro. Car. 366. 1 Jones 342. Seagood v. Hone*, where a copyholder surrendered to the use of *A.* and *B.* and the survivor of them, and for want of issue of the body of *B.* remainder to *J. S.* and his heirs; it was held, that *B.* had only an estate for life; for an estate for life being limited to him by express limitation, he shall have no higher estate by implication; and though perhaps it might have been enlarged by implication in a devise, yet it shall not be so in a surrender or conveyance; which shews the difference between a surrender of a copyhold and a will, and that the surrender is like any other conveyance at common law. He stated the case of *Furse v. Weeks*, 2 Roll. Abr. 90. *Stile 211.* at large; and he said, that the reason of the said resolution was with him. He cited the case to be, that a man devised his lands to his two daughters, equally to be divided between them, to have and to hold to them, and the survivor of them, and to the heirs of the body of the survivor of them; and the question was, whether they were jointtenants or tenants in common? for (says the book) though if a devise be made to two, equally to be divided between them, they shall be tenants in common, because in a will the intent of the devisor shall be interpreted to be so; yet it is not so in case of a grant or feoffment: but in a will it is a tenancy in common by construction, and not by express words, but only by collection of the intent of the devisor: but if the other words of the will shew his intent to be stronger, that he intended a jointtenancy, it shall be interpreted accordingly: and it was ruled accordingly, by reason of the express limi-

limitation made to the survivor. Now he said this case was a full authority for him, for if it had been a tenancy in common in express words, the *habendum* to them and the survivor of them, &c. had been repugnant and void; as if a man grants lands to two, viz. the one moiety to one and his heirs, &c. *habendum* to them and the survivor of them; this last limitation would be void, being directly repugnant to the former. Then he said, he must observe, that it was not agreed very soon, that these words would make a tenancy in common in a will. In *Dyer* 25. pl. 158. it is a question. 6 *Edw.* 6. *New Bendl.* 36. by *Montague* chief justice, it is a jointenancy. The same resolution 3 *Cro.* 330. *Dickens v. Marshall.* Now the reason of these resolutions may be, only because it was so in a deed; for if it had been a tenancy in common in a deed, it could not have been questioned in a will, the argument being *a fortiori* from a deed to a will. As to the objection, *Cro. Eliz.* 695. *Lewen v. Cox*, that it is only the opinion of the council; he answered, that where council takes a matter *ex concessio*, and founds his argument upon it, as *Coke* there does, it is some argument that it is law, if the council be a man of reputation; for if that were not law, upon which he lays his foundation, he would be answered one question by another. 3. There is no reason to make any strained construction in this case, because jointenancy is favoured in the law; and the reason of it is, that as the law does not love fractions of estates, no more does it love them in tenures. Now jointenants are but as one tenant; but in case of tenancy in common all the intire services are multiplied, 6 *Co.* 1, 2. *Bruerton's* case; for which reason jointenancy is favoured. The same mischief will happen, by construing this here to be a tenancy in common, viz. to make five copyhold estates, where otherwise there would be but one, and the lord will have five fines. And the one tenant in common cannot have contribution of suit against his companion, otherwise whilst they are jointenants; and that is (by him) the reason why jointenancy is favoured in law. In the case of *Smith v. Johnson*, cited by his brother *Gould*, the judges held as he said; and there was a rule for judgment *nisi*, &c. but there was no body satisfied with the opinion, and upon motion the rule was set aside, and it was made an *ulterius concilium*; and then, as he was informed by Mr. *Lilly*, who was attorney in the cause, it ended by the death of the parties. For which reasons he was of opinion, that judgment ought to be for the defendant. But by the opinion of the other two judges, judgment was entred for the plaintiff. *Ex relatione m^ri Jacob.*

Note; Mr. *Northey* in his argument of this case cited 14 *Car.* 2. *C. B. rot.* 43. *Hammerton v. Clayton*, to have been adjudged tenancy in common upon the same words.

Baily

Baily *vers.* Grant.

S. C. 1 Salk.
33.
S. C. 12 Mod.
440.
A mate of a
ship may sue
in the admi-
ralty for
wages.

UPON the motion of Mr. Raymond towards the end of last Michaelmas term a rule was made to hear council of both sides the first day of this term, why a prohibition should not be granted to the court of admiralty, to stay a suit there by the mate of a ship for his wages. And he urged, that the admitting the mariners to sue there was rather an indulgence, than any proper jurisdiction that they had to hold plea there of wages arising upon a contract made upon the land; and that it was a long while before it was permitted, but that now it ought not to be extended any farther: That in the case of a master of a ship a prohibition was granted last Trinity term, between *Clay* and *Snelgrage* [ante 576.] That this seemed to be a middle case, but rather inclining to that of the master; because in case of the death of the master he succeeded in the government of the ship, and was always overseer of all the other mariners. That the same motion was made Mich. 10 Will. 3. B. R. between *Hooke* and *Moreton* [ante 397.] and that the rule was made as here, to hear council, &c. and upon its being many times moved no prohibition was made, and they proceeded no farther in the admiralty; for which, &c. But *e contra* serjeant *Hall* argued, that no prohibition ought to be granted. And of that opinion was the whole court, because the mate is not distinguishable from other mariners, only in title; he contracts with the master, and is as his servant, and therefore does not differ from the mariners. But the master contracts with the owners upon their credit; whereas the mate contracts only with the master, and not upon the credit of the owners, but upon the credit of the ship. And therefore the rule was discharged. The same rule was made this term upon a motion in the Common Pleas. See 2 *Ventr.* 181. *Marsh v. Alleston.*

Freeman *vers.* John Blewett, Sir Richard Blackwell
& al'.

S. C. 1 Salk.
409.
S. C. 12 Mod.
396.
12 Mod. 320.
S. C. 3 Salk.
220.
In justification
under a reple-
vin in London,
and a precept
to the defen-
dant as ser-
jeant at mace,

IN an action of trespass for his goods taken, &c. the defendant pleaded, that a plaint in replevin was entered by J. S. &c. in the court of the sheriff of London; upon which a precept issued, directed to the defendant, being a serjeant at mace, commanding him to replevy the goods; by virtue of which writ the defendant replevied them, and delivered them to J. S. &c. The plaintiff demurred. And Sir *Bartholomew Shower* for the plaintiff took exception to this plea, that the defendant did not shew that this precept

3

the defendant ought to shew that the precept was returned,

cept was returned by him, which he ought to have done. 20 Hen. 7.
 13. 21 Hen. 7. 22. And the difference is, between the officer
 himself to whom the writ is directed, &c. and a bailiff who justi-
 fies under such officer, for he has no need to shew that the writ
 was returned, because he has it not in his power. But in escape <sup>Where the re-
 turn of a writ
 must be plead-
 ed.</sup> against the sheriff or other officer to whom the writ or precept was
 directed, there is no need to shew that the writ was returned, be-
 cause the defendant shall not take advantage of his own wrong.
 And it appears, that the serjeant at mace is the officer, because an
 action for escape lies against him for the escape of a man taken by
 city process, and not against the sheriff; though for the escape of
 a man taken upon a *latitat* it lies against the sheriff, and not against
 the serjeant. 1 Roll. Abr. 806. *E contra* it was argued by Mr. Dee
 and Mr. Broderick at several days for the defendant, that the plea
 was good, because the possession being changed by delivery of the
 goods to the plaintiff in replevin, the design of the writ (which
 was only to give back to the plaintiff his possession) was satisfied,
 and therefore that the writ has no need to be returned. For the
 law supposes the plaintiff in replevin to be owner of the goods, and
 the defendant to be a bare possessor; and therefore a claim of pro-
 perty by the defendant suspends the execution of the writ. And
 therefore when the writ is executed, and the possession restored to
 the owner, the matter is determined; but the proceedings upon the
 plaint are entered in the sheriff's court, and the defendant may ap-
 pear to it. And therefore this case differs from the case of a *capias*
 or *fieri facias*, &c. which are, *ita quod habeas corpus* or *denarios*
apud Westminster, &c. But upon the first replevin no return ought
 to be made; but if it is executed, the matter is determined. In
 the *pluries* there is, *vel causum nobis significes*, and therefore the
pluries is returned in the Common Pleas or King's Bench. This
 appears also by a recaption *pendente placito*, the words being *ut di-*
citur, and not *sicut nobis constat de recordo*, as it should be, if the
 writ was returned; which demonstrates, that a replevin is looked
 upon as a writ not returnable. And there is no precedent, where
 a replevin is pleaded, that a return was ever shewn. It was urged
 also, that trespass would not lie for the taking of goods by the de-
 livery of the sheriff or his bailiff, by virtue of a replevin; but the
 defendant ought to pursue in the replevin. Bro. trespass 48, 76,
 104, 154. Fitz. trespass 198. After these several arguments now
 this term Holt chief justice delivered the opinion of the court, that
 the plea was ill for want of shewing the precept was returned; for
 the precept is returnable, and the defendant was commanded to
 make return of it. If a *capias* in *mesne* process is directed to the
 sheriff, and an action of false imprisonment is brought against the
 sheriff for executing it, the sheriff cannot justify under it, without
 shewing that he returned it. And the difference is as to this matter

Ante 617.

between the principal officer to whom the writ is directed, and a subordinate officer; the former shall not justify under the process, unless he has obeyed the court in returning it; *contra* of another, who has not the power to procure a return to be made. And there is more reason for it in the case of a replevin, than in the other cases; for if the officer replevies the goods, the defendant cannot do any thing, unless he return the writ; for though he has a day upon the roll, and he may come in and demand the plaintiff; yet if the writ is not returned, the court cannot know what judgment to give; for if it appears upon the return of the replevin that the goods were delivered, then the particular goods will appear; and then if the plaintiff be nonsuit, the defendant will have a *retorno habendo*; but if they were not delivered, but an *elongata* returned, then a *capias in withernam* ought to issue. As to the objection made by Mr. Broderick, that there are many cases cited by him, where justifications have been made under writs of replevin, without shewing that they were returned, he answered, that there will be a diversity; for if they were the first or second writs, it would be good, without shewing a return; because the first replevin, and perhaps the second, is not returnable, and yet the sheriff ought to execute them, because they are in nature of a *justicies*, upon which he may hold plea in his county court, and day is given upon them in the county court; but they are not returnable here, and so they cannot be returned, nor a return pleaded; but in a *pluries* replevin the sheriff cannot justify, without shewing the return of it, because the *pluries* replevin is always made returnable. And (by him) if debt or *scire facias* be brought upon a judgment against the defendant, he may plead, levied by the sheriff by virtue of a writ, and he has no need to shew the return of it. And Gould justice said, that the most part of the cases cited by Mr. Broderick were where the defendant was bailiff. And judgment was given for the plaintiff.

Gidley *vers.* Williams.

S. C. 1 Salk.

37

S. C. 12 Mod.

443.

In an action brought by an administratrix there is an omission of the allegation that administration was granted to her; that is not aided by verdict, but by pleading over.

THE plaintiff as administratrix of Richard Gidley brought debt upon bond, and declared as administratrix of her husband; but in the body of the declaration she did not alledge that administration was committed to her, but at the end of the declaration *profert literas administratorias praedicti Richardi mariti sui per quas satis liquet, &c.* Upon *non est factum* pleaded, and verdict for the plaintiff, Mr. serjeant Carthew moved in arrest of judgment, 1. That it did not appear that the obligee died intestate. 2. That it is not shewn that administration was granted to her. 3. There is no *profert* of the letters of administration; for it is a *profert*

profert of letters of administration of her husband, as if her husband had granted them, and not of the goods of her husband, as it ought to be. And as to the first, it was argued by him last Michaelmas term, and by Sir Bartholomew Shower this term; that there is a difference, where an action is brought by an administrator, and where against an administrator; for in the latter case the precedents are, *qui obiit intestatus ut dicitur*, but in the former case positively: But all the precedents are, that it ought to be so. As to the second, that if the plaintiff was not administratrix, a recovery by her in this action will not be a bar in another action brought by the rightful administrator; and therefore she ought to shew herself to be administratrix, to intitle her to her action. And that such defect will not be aided by the verdict, because a verdict cannot supply that which did not come in issue upon the trial, and administratrix or not, could not be questioned upon the trial upon the issue of *non est factum*. 2 Ventr. 84. 1 Sid. 228. So an executor or administrator brings an action in right of the testator, as debt for rent due in the life of the testator, and the defendant pleads, *non detinet*, the plaintiff is not bound to prove his administration; but for rent due in his own time, and *non detinet* pleaded, Stile 282. there the verdict would have aided this fault in the declaration, because the jury could not have found for him, unless he had been proved to be administrator.

And it was held by the whole court, that for the want of shewing, that the administration was granted, it would have been ill upon demurrer. 1 Sid. 228. They ought to shew by whom the administration was granted, to the end that it may appear to the court; for it may be committed by a peculiar, and then the plaintiff ought to say, *cui commissio administrationis de jure pertinuit*, or *Qu. See Vere's* *loci illius ordinarius*; so if the administration was committed by case, 5 Rep. the archbishop, they ought to say, that the intestate had *bona notabilia* in divers dioceses. Indeed if it was committed by the ordinary, 30. a. he having the power of committing of administration of common right, one has no need to say *de jure pertinuit*, &c.

2. It was held, that this was not aided by the verdict, because it was not to be proved upon the issue of *non est factum*.

Then a question was made, whether the defendant had not admitted the plaintiff to be administratrix by pleading in chief. And for this Mr. Broderick for the plaintiff cited 1 Roll. Abr. 791. Bro. monstrans des faits, 82. variance, 59. 36 Hen. 6. 32. Cro. Car. 209, 240. 3 Leon. 178. Yelv. 129. Hob. 232. Moor 885. 2 Sid. 60. Owen vers. Holden. 1 Ventr. 212. And Holt chief justice this term delivered the opinion of the court to be, that the declaration

declaration is made good by the plea in bar of the defendant, at common law. For in a declaration matters have no need to be shewn so specially and certainly as in a plea in bar. In *Hob. 38. Cope v. Lewen*, the want of *profert* of the letters of administration is held matter of substance, and there are many like cases. But in 1657 in the Common Pleas between the lord *Mobun* and *Arthur* (which case he said he had a report of in a transcript of some reports which were in the custody of the lord chief justice *Bridgman*) in *assumpsit* brought by an executor, he declared generally as executor, but did not produce the probate; and upon *non assumpsit* pleaded, and verdict for the plaintiff, it was moved in arrest of judgment, and this exception taken, and the case of *Cope v. Lewen* and other cases cited; but the lord chief justice *Hale*, then a judge of the Common Pleas, said that it had been held otherwise since the case of *Cope v. Lewen*, and that the plea in bar had cured the said fault. And in *Stile 106. Clementson v. Mountford*, both the exceptions taken in this case are over-ruled. But if this were not good at common law, yet they held it good since the *Oxford act 16 & 17 Car. 2. cap. 8.* for the said act having enumerated many matters of form, as the *profert* of letters of administration, has these general words, and all other matters of like nature; which will extend to salve many imperfections of the same nature in declarations. And judgment was given for the plaintiff.

Ingram *vers.* Bernard.

S. C. 3 Salk.
49.
Attachment of
money due by
award.

DEBT upon a bond conditioned to perform an award; the case was, that the award was, that the defendant should pay money such a day; and he pleaded a foreign attachment in *London* issued the same day that the money was payable by the award, and that by virtue thereof they attached the money in his hands the day after, which was the day after that on which the money was payable by the award. And exception was taken to this plea, because at the time that the money was pleaded to be attached, the day of payment by the award (which is now parcel of the condition of the bond) was passed, and the bond forfeited; and so the penalty of the bond was due, and not the money awarded, and therefore that ought to have been attached, and not the other. It was argued for the defendant, that the attachment was awarded upon the very day, though it was not executed until the day after; and that it was their custom, to attach *denarios in manibus*, and not the penalty. The court were of opinion, that the plea was ill. And *Holt* chief justice said, that it would have been a good plea to an action of debt upon the award, but not to debt upon the bond, the penalty of the bond being due by the failure of payment of the money

money awarded upon the day; and therefore that ought to have been attached, for after that the bond is forfeited, the money contained in the condition cannot be attached. If the attachment had been executed, before the bond had been forfeited, it had been well; but though it was attached, yet until it was executed, the defendant might pay the money to whom he would; and therefore not paying it according to the award, he forfeited his bond. And judgment was given for the plaintiff. *Ex relatione m'ri Jacob.*

MR. *Herring* moved for prohibition to stay suit by a woman A woman in the Spiritual Court, where the wife libelled in the Spi- libels against a tual Court for calling her husband cuckold. And he cited *Cro. Car.* man for cal- 111. 1 *Sid.* 248. where prohibitions have been granted in like ling her hus- band cuckold. cases. But the court seemed to doubt of it upon the general que- stion; but they took a distinction between suits by *baron* and *feme*, See May v. which the cases cited were, and this case of a suit by a wife alone. *Hodge, Pasch.* And in this case they clearly denied a prohibition. *Ex relatione* 6 Ann. B. R. *m'ri Jacob.* *Post: 1287.*

Oswald *vers.* Sir Hugh Everard.

A Libel was exhibited against the plaintiff in the ecclesiastical Solicitation of court for several scandalous offenses. And he came, and the chastity of moved the King's Bench for a prohibition, upon a suggestion that women is ex- they were pardoned by the last general act of pardon, being com- cepted in the mitted before. *E contra* it was answered, that they were excepted general act of in the said act by the exception of adultery, extortion, and any pardon under the words, other enormous crime, committed by any person in holy orders, enormous crimes. &c. Therefore they ordered the articles to be read, which ap- peared to be, for the solicitation of the chastity of women, drun- kenness, and other notorious crimes. *Holt* chief justice said, that upon the act of the first of *Elizabeth*, upon which the High Com- mission Court was founded, where power is given to the ecclesiasti- cal commissioners, to punish, &c. many crimes mentioned there, and all enormities whatsoever, a question was made, whether adul- tery was not an enormity within the said act? And it was held, that it was not, *Cro. Car.* 114. because it was punishable by the ordinary. But this case differs from the said case, because adultery is mentioned in the exception, and so the act takes notice of it to be an enormous crime. And if adultery be an enormous act, solli- citation of the chastity of women, and the like brutish actions, are such also. If the words had been enormous crimes, generally, it might have been reasonable, to have construed this act like the act of 1 *Eliz.* but adultery being mentioned, it is otherwise. Where

endeavours were used to debauch women, it was held proper for the High Commission Court; as one may find in 12 Co. 20. and Cro. Car. 114. This suit then being before a competent judicature, they shall proceed to sentence; and if there be occasion, the plaintiff may move for a prohibition afterwards, or he may appeal. And the prohibition was denied. *Ex relatione m'ri Jacob.*

Rex *vers.* Everard.

S. C. 1 Salk.
495.
Cro. Car. 80,
413.

A Presentment at a court leet for erecting of a cottage, &c. contrary to 31 Eliz. cap. 7. being removed into this court by certiorari. Mr. Williams took several exceptions to it,

1. That it was said, and did not lay four acres of land to it according to the statute *de terris mensurandis*, and not said, or ordinance; whereas it was not a statute but an ordinance only. And for this he cited Cro. Jac. 603. But the court over-ruled this exception, and held that it was a statute.

Caption *ad*
curiam visus
franci plegii
cum curia, &c.

2. That the caption was, *ad curiam visus franci plegii cum curia baron*, and so it did not appear at which of them it was made, and the one of them not having authority to take such presentment, therefore it is ill. And for this he compared it to the case of *Valconbridge*, Stile 228. where the caption of an indictment was before justices of assize, gaol-delivery, and oyer and terminer; and because it was not shewn by virtue of which commission in particular it was taken, it was quashed. And he cited a case between the king and *Ayers*, 2 Keb. 139. where a presentment in such form was quashed. And Gould justice cited 10 Edw. 4. 15. a. where a presentment was *ad magnam curiam T. B. cum leta tentam, &c.* and it was quashed, because it did not appear, at which of them it was. But *per Holt* chief justice, where there are several commissions, each of which has authority to proceed in a matter, and their manner of proceeding is different; the indictment ought to shew, before which of them it was taken. But here one of the courts only has jurisdiction in the matter, and therefore though they were both held together, it must be taken before those who had authority to proceed in it. The words here are, *cum curia baron*, which do not imply, that the presentment was made at the court baron, but only that both courts were held together. If it had been *ad curiam baron*, the objection had been stronger. The case of *Edw. 4.* is ill, because the presentment is applicable to the *magna curia*, the jurisdiction of which no body understands, nor what court it is. And as to the case, it might be, because the matter was not presentable at either. And Gould justice said, that the

case

case of *Ayers* was ruled for the said reason, for it was not presentable at the leet, because it was not a publick nuisance, nor at the court baron, because it was a private right.

3. That the *anno domini* was in *English* figures. But because *Anno domini* in the year of the King was in words at length, it was held certain enough, and the year of our lord was only surplusage. And And therefore the motion was denied. *Ex relatione m'ri Jacob.*

UPON a motion for a new trial in an action for a seaman's wages *Holt* chief justice said, that if the ship be lost before the first port of delivery, then the seamen lose all their wages; but if after she has been at the first port of delivery, then they lose only those from the last port of delivery. But if they run away, although they have been at a port of delivery, yet they lose all their wages. *Ex relatione m'ri Jacob.*

Horne *vers.* Lewin.

REplevin. The defendant made nuisance as bailiff to Mr. *Pullein*. S. C. 2 Salk. 583. S. C. 12 Mod. 352. for that that Sir *Hugh Smithson* seised of the place where, &c. in fee, granted a rent-charge of 100*l.* per annum, payable half yearly by two equal portions to Mr. *Pullein*, issuing out of the place where, &c. *inter alia*; and for the arrears of one year he took the cattle in the place where, as a distress. As to 50*l.* parcel of the 100*l.* in arrear supposed, &c. the plaintiff pleaded in bar of the avowry, that the defendant took the cattle of his own wrong, *absque hoc* that any thing was in arrear; and concluded with an averment. To which plea in bar the defendant demurred specially, and shewed for cause, that it wanted form, and that it ought to have been concluded to the country, and that no issue was to be joined upon it, &c. And as to the other 50*l.* the plaintiff pleaded in bar of the avowry, that he was really all the last day of payment upon the land at the most notorious place, &c. to have paid it, but that no person came on the part of Mr. *Pullein* to receive it, *et quod adhuc paratus est*, &c. *et profert in curia* the 50*l.* rent, *et petit judicium et damna sua occasione captionis et detentionis averiorum praedictorum sibi adjudicari*, &c. Upon which the defendant comes and says, that for that that the plaintiff hath confessed the said 50*l.* to be unpaid, and hath brought it into the court, he taketh it out of the court; and *protestando*, that the plaintiff was not ready at the day, &c. for plea to have his damages he saith, that he after the last day of payment, *viz.* &c. demanded the said 50*l.* &c. and therefore because they were not paid, &c. he prays his

Replevin.

Avowry for
rent. The

plaintiff pleads
in bar that the
defendant took
the cattle of
his own

wrong, *absque
hoc* that any
thing was in
arrears; ill up-
on special de-
murrer.

his damages, &c. To which replication the plaintiff demurred, &c. And it was argued by Mr. Chesbire, Mr. serjeant Hall, and Mr. Mulso, at several times, that the plea in bar as to the first 50l. was ill, because the plaintiff ought to have pleaded directly, *riens arrere*, which was the general issue. *Maynard's Edw. 2. 50. Fitzb. cessavit 28. issue 9. avowry 217. Long 5 Ed. 4. 65. Bro. trespass 206. Fitzb. trespass 160. 17 Ed. 3. 58.* And he ought to have concluded to the country. That this amounts but to the general issue, and therefore that being shewn for cause upon the special demurrer, it was informal and bad. Against which it was argued by Mr. Raymond and by Mr. Broderick for the plaintiff, that the plea was well enough notwithstanding the said exception. And they admitted, that when the plea is a full negative to the material part of the declaration, &c. the defendant or plaintiff respectively, &c. ought to conclude to the country; but where *absque hoc* may be well taken, which is tantamount to a negative, the defendant or plaintiff ought to rejoin to it, or reply to it, and offer an issue. *Dier 353. a. pl. 29. 2 Andersf. 6. 101, 121.* From whence the question will be, whether the plaintiff can plead in bar of an avowry for rent, *prisal de son tort demesne sans ceo que riens fuit in arrere*. For if such plea can be pleaded, the conclusion in this case will be good; because it will be the same in conclusion with all other pleas which conclude with a traverse *absque hoc*. Where a title is pleaded, the plaintiff cannot reply *de son tort demesne* generally, viz. *absque tali causa*, but the title must be answered specially. *Cro. Jac. 225.* And as to this there is no difference between an action of trespass and replevin. *Gouldsbor. 52. Broad v. Hendy, in replevin. 2 Saund. 294. 2 Keb. 712, 735. White v. Stubbs, in trespass.* But then the books, that say, that *de son tort demesne* generally is no plea where a title is pleaded or interest claimed, must be understood of general pleas *de son tort demesne absque tali causa*, and not of such pleas, where some material part of the plea of the adverse party is traversed. And that appears from *Crogate's case, 8 Co. 67.* where the rule is taken, that when the defendant in his own right, or as servant to another, claims an interest in the land, or to any common, or rent issuing out of the land, or to any way or passage over the land, &c. there *de son tort demesne* generally is no plea; where the *emphasis* is put upon the word *generally*, as appears by that which follows. But if the defendant justifies as servant, there *de son tort demesne* in any of the said cases with a traverse of the command, that being material, will be good; which admits, that *de son tort demesne* with a traverse of the material part of the plea will be good; and no difference made between trespass and replevin. Now here, this plea in bar fully answers the avowry, and traverses the material part of it, of which the *de son tort demesne* is but inducement;

ment; but it is a proper inducement, and therefore good. And for cases *Raymond* cited *Mich. 5 Hen. 7. 2. pl. 3. per Wood. 1 Roll. Rep. 46. Lee's case. Rast. Entr. 557, 558.* where to an avowry for rent by prescription, &c. the plaintiff pleaded in bar, *prisal des overs de son tort demesne*, and traversed the prescription; which proves, that a plea *de son tort demesne* with a special traverse of a material point is good in replevin. Besides which, they argued, that if this plea should be adjudged ill for this reason, it would destroy all pleas *de son tort demesne* with special traverses. For here the plaintiff might have pleaded *riens arrere*, without having induced his plea by *de son tort demesne*; so in all cases, where a man may plead *de son tort demesne*, and traverse some material part of the plea of the adverse party, he may also deny the said material part directly, and not induce it with *de son tort demesne*; and yet without doubt a man may plead in many cases *de son tort demesne*, and traverse a material part of the plea of the adverse party, and such pleas have always been held good. Wherefore, &c. But notwithstanding this, the whole court were of opinion, that the plea was bad for this reason; for though it is the same thing in effect with a plea of *riens arrere*, yet *riens arrere* is the proper plea in bar of an avowry, and is *quasi* a general issue; and here the plaintiff has gone round about to introduce it, where he ought to have pleaded it directly. It is but form, but it is legal form, which the law will have to be followed, and whereof advantage shall be taken upon a special demurrer, as well as of pleading specially that which amounts to the general issue. The cases cited are upon special pleading, where it is proper to induce a traverse by a plea of *son tort demesne*. But in this case it drives the avowant to an inconvenience, in compelling him to make a replication, where the plaintiff ought to have pleaded his plea of *riens arrere*, and concluded to the country. And for these reasons all the court held this plea in bar of the avowry to be ill.

Then it was argued by Mr. *Raymond* and Mr. *Broderick* for the plaintiff, that the replication to the bar to the avowry was ill, for the plaintiff having pleaded a tender at the day of the rent, and that no person was ready to receive it, this was a good bar of the damages. 6 *Hen. 4. 4. 38 Edw. 3. 3, 13. Debt, 178.* and the avowant shall not be intitled to have damages, without making a new demand; but if a new demand be legally made, that will turn it upon the grantor of the rent, or tenant, to pay the rent; and if he does not do it, he shall be liable to pay damages: But such demand ought to be made to the person, and upon the land; and a demand to the person without being upon the land, or upon the land and not to the person, will not be sufficient. 7 *Co. 28. Maund's case.* If the terretenant tenders a rent seck upon the land

How rent shall be demanded after tender at the day?

at the day, and no body is there, the grantee cannot demand upon the land in the absence of the person, nor of the person off from the land; not upon the land, because the tenant is not bound to be there, he having tendered it at the day; not of the person only, because he is not bound to carry so much money about with him. But if it be demanded of the person upon the land, then if it is not paid, the tenant shall pay damages and costs. 2 Roll. Abr. 427.

Against which it was argued for the avowant, that a man may distrain for arrears of rent without any demand; and that the difference is, between a re-entry for non-payment of rent, or a *nomine poenae*, there a demand ought to be of the rent at the day; but in case of a distress the demand may be at any time, and the distress itself is a demand. Hob. 207. *Crawley v. Kingmill*. But to this point no resolution was given by the court. See *Cro. Eliz.* 828. *Cro. Car.* 76. Hob. 8.

Proceeding
for damages
after money
taken out of
court.

Another exception was taken by the plaintiff's counsel, that the avowant could not proceed for damages, because he has taken the money out of court. For where judgment ought to be given for the thing itself, the acceptance of it shall be a bar to the plaintiff from the recovery of damages for detaining of it. *Keilw.* 20. *Dier* 227. And for this *Co. Li.* 207. Hob. 199. where it is said, that if upon a tender pleaded the plaintiff will not receive the money, but takes issue upon the tender, and it is found against him, the money is lost for ever. And in 21 *Edw.* 4. 25. pl. 15. it is held, that if the plaintiff traverseth the tender, the defendant shall have his money again; because the plaintiff's intent is, to make the whole obligation forfeited, and he has refused the money by matter of record, and taken another issue at his peril. 22 *Edw.* 3, 5. The bringing of money into court is conditional, viz. that if the plaintiff accepts it, it shall be in full satisfaction. *Cro. Jac.* 126. pl. 13. *Harold v. Clotworthy*. In debt upon bond with condition for payment of a less sum, the defendant pleaded a tender and *touts temps trift*; the plaintiff received the principal sum in court, and judgment was given to acquit the defendant of the sum received; and the plaintiff to have damages, alleged a demand of the money of the defendant; and upon demurrer it was adjudged for the plaintiff (which is false printed, as appears by the reason given, and it ought to be the defendant) where it is said, that if he would have had damages, he should not have received the money, but have suffered it to remain in court, for after judgment *quod eat inde sine die* no issue shall be taken. Therefore here the avowant having taken the money out of court, cannot proceed afterwards, but has abated his whole avowry, because it is in a manner intire, since he ought to have return of all the cattle.

E contra it was argued by the avowant's council, that he may proceed notwithstanding the taking of the money out of court. For it would be absurd, that it should lie in court, only to the intent that the officer should have the interest of it, and to no purpose can it lie in court, since he agrees that it was due. And for this *Co. entr.* 595. *Aston. prec. debt*, 271. *Rast. entr.* 159. *Liber placit.* 159. *Rast. entr. mesne pl.* 7. are express in point, that a man may proceed after taking of money out of court. And the reason of the case in *Cro. Jac.* 126. is, because the judgment was entered, *quod eat inde sine die*. But all the times this point was stirred, *Holt* chief justice seemed to be strongly of opinion, that the avowant could not proceed for damages, after taking the money out of court. For though in debt upon a single bill acceptance of the money pending the plea is no plea, because it is no plea to a specialty; yet when the money is brought into court, and taken out by the plaintiff, such acceptance is entred upon record, and therefore will bind the plaintiff. Besides, that the avowant ought to have return of the cattle, if the court be of opinion for him, which cattle ought to be returned to the plaintiff upon payment of the rent, &c. though return irreplevisable had been awarded. 2 *Inst.* 341. *Cro. Eliz.* 162. 2 *Leon.* 174. *Annesley v. Johnson*. But here the rent is received before. And the principal judgment in replevin is to have a return, for no damages were given until the statute of *Henry 8.* Besides, that the reason of the case in *Cro. Jac.* 126. is in point. For upon taking of the money out of court judgment ought to be entred, *quod* the defendant *eat inde sine die*; and if the plaintiff agrees, that such judgment shall be given, he ought not to meddle with the money; and therefore where a defendant pleads *touts temps prist*, and brings the money into court, and concludes with a prayer of judgment as to the damages; if the plaintiff takes the money out of court, he must agree to all that the defendant has said, otherwise he ought not to take the money out of court; for a man cannot proceed for damages, after he has barred himself from the having judgment for the principal, where the damages are merely accessory, except in the case of ejectment, where the term expires pending the suit. But as to this point the other three judges seemed to doubt, and they gave no opinion, but rather inclined to be of opinion, that the avowry was not abated by this taking of the money out of court.

Trin. 1 Ann.
B. R. Burton
v. Souter.

But the whole court were of opinion, that the bringing in of the money into court in this case was superfluous; for though in debt upon bond with condition to pay the money, if the defendant pleads a tender with *adbuc paratus*, he ought to bring the money into court,

Tender plead-
ed.
Ante 254.

court, because it is parcel of the demand; yet here in replevin the defendant must avow the taking of the cattle, and whether the money be paid or not, is not the question, but whether the distress was rightly taken or not; if it was, the avowant ought to have return; if not, the plaintiff ought to have damages. And they all held, that the bar to the avowry was ill pleaded. 1. Because it is pleaded with a *paratus*, where it ought to be pleaded with an *obtulit*, &c. 2. Because it is pleaded in bar, where it ought to be pleaded only in excuse of damages. 1 *Ventr.* 322. *Osborn v. Beversham*. [See *Raym.* 418. *Crouch v. Folfstoffe*. 8 *Affis.* pl. 37. *Bro. tous temps prist*, 25.] But if the tender had been well pleaded, it would have chased the avowant, to shew a demand, to intitle him to the distress. But here the plea in bar not amounting to a tender, it is ill; and therefore the bringing in of the money, and the taking of it out, is superfluous. And judgment shall be upon the avowry for a *retorno habendo*. And judgment was given for the avowant accordingly.

Horne v.
King.

Grant of a
rent pleaded
out of the
place, where,
&c.

Ante 155.

Note, that in a case between *Horne* and *King*, which was in replevin for a distress taken for other arrears of the same rent granted by Sir *Hugh Smithson*, and avowry for it, as in this case above, exception was taken to the avowry, that the rent was said to be granted out of this place *inter alia*, and it may be that the grantee of the rent has purchased the other lands, and then the rent shall be suspended, and the grantee cannot distrain for it; therefore the grant ought to be shewn in the avowry intire, to the end that the plaintiff may shew, if there was any such purchase, &c. And of this opinion *Holt* chief justice seemed at first to be. But afterwards, *Hil. 11 Will. 3.* the avowry was held good, notwithstanding the said exception. And judgment was given there for the avowant. And therefore the said exception was not moved in this present case. See *Co. Intr.* 590. 6 *Co.* 39. *H. Finche's* case. 5 *Co.* 59. 1 *Co.* 54, 143. *Hearne's pleader* 744, 761. 1 *Saund.* 189. 2 *Saund.* 195. *Thomps. entr.* 273, 276. *Winch entr.* 951, 979, 1013. where a difference seems to be made, where the grant of the rent charges it upon a manor, or close, or intire thing, and where it charges it upon divers things. And upon oyer of the deed prayed, the plaintiff might well plead purchase, &c.

Hockley *vers.* Lamb.

Intr. Hil. 9 Will. 3. B. R. Rot. 430.

TRespass for his cattle taken. The defendant justifies the taking of them *damage feasant* in his freehold. The plaintiff replies, and makes title to common in the place where, &c. *a tempore fractionis campi* (it being a common field) until, &c. And upon traverse of the common taken by the defendant, and issue joined upon it, a verdict was found for the plaintiff for the common. And it was several times moved in arrest of judgment, that it was insensible and uncertain what common was here claimed; for a *fractione campi* is a word of the country perhaps, but the law does not understand what it means. And of that opinion was *Holt* chief justice. But *Gould* justice held, that upon a demurrer it would have been ill, but now it is good after verdict. But *per Holt* chief justice the verdict cannot aid a thing unintelligible; for it has only found the common, as the plaintiff has replied. *Sed adjournatur.*

Easter Term

13 Will. 3. B. R. 1701.

Sir John Holt Chief Justice.

Sir John Turton

Sir Littleton Powys } *Justices.*

Sir Henry Gould

Lane vers. Sir Robert Cotton and Sir Thomas Frankland.

Intr. *Pasch.* 10 Will. 3. B. R. Rot. 403.

S. C. 1 Salk.

17, 143.

5 Mod. 455.

2 Modus intr.

108.

Carth. 487.

S. C. Comyns

100.

S. C. 12 Mod.

482.

Case does not

lie against the

post-master

general for

Exchequer

bills taken out

of a letter de-

livered into

the office.

THE plaintiff brought an action upon his case against the defendants as post-master general, for that that a letter of the plaintiff's, being delivered into the said office, to be sent by the post from *London* to *Worcester*, by the negligence of the defendants in the execution of their office, was opened in the office, and divers Exchequer bills therein inclosed were taken away, *ad damnum*, &c. Upon not guilty pleaded, this case was tried before *Holt* chief justice at *Guildhall* in *London*, and a special verdict found there.

The jury found the act of 12 Car. 2. cap. 30. of the erection of the general post-office, and that a general post was established pursuant to it between *London* and *Worcester*: they find the act of 1 Jac. 2. cap. 12. which consolidates the estates in fee and in tail in the said office in the King; that the defendants were constituted post-master general by letters patent of the King that now is, bearing date the first year of his reign under the great seal of *England*, pursuant to the said act of 12 Car. 2. and that by the said patent they had power, to make deputies, and to appoint servants, at their pleasure, and to take security of them, but in the name, and to the use, of the King, and that the defendants should obey

obey such orders as they should receive from time to time from the King under the sign manual, and as to the management of the revenue, that they should obey the orders of the treasury, and farther that the King granted to them, that they should not be chargeable, to account for the mismanagement or default of their inferior officers, but only for their own voluntary defaults; and farther the King granted to them the salary of 1500 *l. per annum* out of the profits arising out of the office, &c. that the office was kept in *London*; that the plaintiff being possessed of eight Exchequer bills, inclosed them in a letter directed to *John Jones at Worcester*, and delivered it to *Underbill Breefe* the receiver of the letters at the post-office; that *Breefe* was appointed by the defendants, to receive the letters at the office, and was removable by the defendants, but received his salary out of the revenue of the said office by the hands of the receiver general; that the letter was opened in the office by a person unknown, and the bills were taken away; *et si, &c.*

This case was argued several times at the bar by Sir *Bartholomew Shower*, Mr. *Northey*, and Mr. *Pratt*, for the plaintiff; and by serjeant *Wright*, the solicitor general *Hawles*, and the attorney general *Trevor* for the defendants. And now this term the judges pronounced their opinions in solemn arguments, *viz.* *Turton*, *Powys*, and *Gould*, justices, that judgment ought to be given for the defendants; and *Holt*, that judgment ought to be for the plaintiff.

Gould justice said, that at first he was of opinion with the plaintiff, and now upon great consideration he had changed it. And he founded his present opinion upon consideration, 1. Of the design of the act, and nature of the office, which is stiled in the act a letter office, and not regarded there as an absolute security for dispatches, but for promotion of trade in procuring speedy dispatches. If a letter had barely miscarried, the defendants could not have been chargeable for it; for though there is property in a letter, yet it is not a valuable property, for which a man shall recover damages. Letters in their nature are missive, and transient from hand to hand, and therefore difficult, if not impossible, to be secured. And therefore he denied the assertion at the bar, that the action would lie for the miscarriage of a letter, like *Yelv. 68.* where it is held, that the value of the bond is that of the debt, not of the wax and paper. Which determines this case, because the Exchequer bills being inclosed in a letter (though they are bills of credit, yet) are estimable only as a letter. For whatsoever is carried by the post, has the denomination of a letter.

Case does not lie for the miscarriage of a letter.

2. If

2. If any thing can support this action, it must be a contract expressed or implied; but here is neither the one nor the other. The security of the dispatches depends upon the credit of the office, as founded upon the act. *Breefe* is as much an officer as the defendants, but they are more general officers. But *Breefe* is the King's officer, and if there is any contract, it is between the plaintiff and *Breefe*; which appears by the act, which appoints several acts for all, and puts confidence in all. And therefore they resemble a community of officers acting in several trusts; and every one shall answer for himself, not one for the act of another; as in case of a dean and chapter, 1 *Edw. 5. 5. a.* If the defendants had died, yet *Breefe* would have continued officer; and therefore *Breefe* has a charge and trust of himself, and is not a deputy to the defendants.

3. This office is founded in government, and reposed in the King; and it cannot be answerable for defaults, but the remedy is, upon application to the King to procure the officer to be turned out. *Dier 238.* In the act, *par. 10. and 15.* penalties are imposed upon the post-master general for default in his office, so that the parliament has provided punishment, and did not intend, that he should be liable to actions. In *par. 7.* the act appoints the delivery of letters, &c. brought by masters of ships, &c. from beyond the sea to the deputies of the post-master; which shews, that the act did not intend, to charge the post-master general. And the inconvenience recited to have happened before by miscarriage of letters, *par. 6.* seems to shew, that no action lay for the miscarriage of a letter; and then this act did not design to give a greater security by any other means than by alteration of the method.

4. It is inconsistent with the nature of the thing, that the post-master general should be liable, because they could not give caution of the receipt of a letter to be sent by the post, as the master of a ship, inn-keeper, or carrier, may of the receipt of goods. Besides, that this office is so extensive, and requires such a number of servants, &c. speed in conveyance, journeys by day and night, when there is no guard in the country; and therefore it resembles the case of piracy, which is *damnum fatale.* 4 *Co. 84.* Robbery a good plea for a factor, because he is obliged to expose the goods to sale, and hath them not in safe custody, as a baillee hath. 8 *Ca. Caley's case.* An inn-keeper shall not answer for a horse of a guest put to graze by his order for the same reason. *Plowd. 308. b.* gives the reason, why a parol promise shall not bind without consideration, because it passes lightly from a man without deliberation. So here, all is done in a hurry, and then a letter may easily be taken away, and the plaintiff is no stranger to these difficulties.

5. Objection. 1 Vent. 190, 238. Answer. The reasons of the said case do not hold here. For here the defendants have only a salary for executing of part of the office. It is the recompense, that binds the contract. Now that is properly, where it is variable according to the hazard; but here the reward is settled, and so small that it is not proportionable to the hazard. As to the second reason given there, that the master is an officer; that is not the only reason, though the action would not lie, if he was a servant. 3. The post-master general cannot give caution for the receipt of a letter.

6. The trust is only to carry letters. And therefore Breefe having received Exchequer bills, which are treasure, Breefe has exceeded his authority (admitting that the defendants were chargeable by the act of Breefe) and therefore the defendants are not liable. 9 Hen. 6. 53. b. Cro. Jac. 468. Doct. & stud. 137. Fitzh. nat. bre. 71. f.

7. If this action lay, it would be of very mischievous consequence, because it would expose the defendants to all the frauds of the merchants men. As a man might rob the mail of that which he himself put into a letter, and afterwards bring an action and recover it, &c. And many of the same reasons were agreed by the other two judges, who argued for the defendants.

Powys justice agreed, that if such an office had been erected at Latch 48. common law by a private man for gain, an action would have lain at common law against him for a miscarriage. Hob. 17. Cro. Jac. 330. 1 Sid. 36.

2. He differed from Gould justice as to the matter of Exchequer bills; for he held, that they were not treasure, but bare bills of credit; and that the word packets in the act was general, and could not be confined to any particular sort of things more than another. And therefore jewels (by him) might be sent by the post in packets.

3. He observed, that the parliament in assessing the price had regard only to the size or weight, and not to the value, as how many sheets or ounces; which argues, that the parliament did not intend, that the post-master general should be answerable for them, if they were lost.

4. He held, that an action would lie against Underbill Breefe, and therefore the plaintiff is not without remedy.

5. The express words of the patent are, that the defendants shall not answer for the default of the inferior officers.

6. The defendants have not the power of the management of the office according to their discretion, but are subject to the control of the King and of the treasury. And because the inferior officers are servants of the King, and not of the defendants, their wages being paid to them out of the revenue of the post-office, and the security taken of them in the name of the King; and therefore it is unreasonable, that the defendants should be answerable for the acts of the inferior officers. But it would have been otherwise (by him) if the office had been farmed.

Turton justice added, that this office was not designed for the conveyance of things of value, and therefore it would not be material, whether Exchequer bills were treasure or not, if they were valuable.

2. Exchequer bills were newly invented, and not known at the time of the making of the act, and therefore could not be intended to be within it.

A master of a ship may reimburse himself out of the mariners wages for a loss happening by their negligence.

3. He cited a record out of *Molloy*, 24 *Edw. 3. n. 45.* that the master may reimburse himself out of the wages of the mariners, if the loss happened by their negligence; which would distinguish the case of the master of a ship from this of the post-master general.

4. He cited the case of *Herbert v. Pagett*, *Raym. 53.* where it was held, that an action would not lie against the *custos brevium*, for so negligently keeping of the records, that a particular record was lost; because other clerks beside his had access to the office. And here there are many persons, who have access to the post-office. And for these reasons these three judges held, that judgment ought to be entred for the defendants.

Holt chief justice *e contra* argued, that judgment ought to be given for the plaintiff. And he said, that he would not make it any part of the question, if a letter was broke open upon the road, whether the post-master general should be chargeable for it; but he would confine himself to the present question, where a letter was delivered at the office to the proper officer appointed to receive it, and there lost, whether in such case the post-master general shall be liable. And he held, that he should, for these reasons.

1. Because the post-master is by this act intrusted with the interest and property of the subject, to the end that no damage may accrue to him; which is implied by the making him an officer. The act appoints one general letter office to be erected in London, and the care thereof is committed to the post-master general; who, his deputies and servants, ought to have the management solely of the post-office. So that all the persons concerned are as his deputies. And by the nature of the trust he ought safely to keep all letters there at his peril in his custody. This case does not differ from the case of the marshal of the King's Bench, or warden of the Fleet, who are obliged safely to keep the prisoners at their peril; and it is no plea for them, that traitors broke the prison against their will. 33 Hen. 6. 1. And the law was so at common law in case of damages recovered in trespass *quare vi et armis*, and when the statute 25 Edw. 3. cap. 17. made the body liable to execution for debt, the gaoler ought to keep such, as safely as defendants condemned for damages in trespass *vi et armis*. The same law, if goods levied upon a *levari facias* (which was the only execution before the statute gave a *fiari facias*) in execution were rescued from the sheriff; he was liable to an action. The same law of a man in execution upon the statute of 13 Edw. 1. *de mercatoribus*. The same law, if upon an *extendi facias* upon a statute merchant the goods of the consignor taken by the sheriff were rescued from him. And there is no difference between this case of the post-master general, and the gaoler, sheriff, &c. for he ought safely to keep the letters delivered to him, as the others ought safely to keep their prisoners, or goods taken in execution.

2. The subject ought to pay a *premium* for the carriage, to him who makes it his employment. And when a man takes an employment upon him, to receive the goods of the subjects, and receives a *premium* for it; that is sufficient, to charge him, to answer the loss at all adventures, for such losses as happen within the realm. 2 Cro. 188. Hob. 17. Rich. v. Kneeland.

Objection by Gould justice. That this office is founded in government.

Answer. If he means, that it is founded by the law; he could not agree his inference, because it is only founded by a different sort of law, *viz.* the one by common law, the other by statute law, which cannot make a difference. And he did not see in what sort of government it was otherwise founded, but only that a trust is given for the benefit of the subject.

Objection

Objection by Gould justice. That such charge ought to be by some sort of contract.

Answer. He denied that any contract was necessary, to charge the defendants; but it is like the cases, where officers by course of law receive goods for the benefit of others, they are obliged to keep them safely by them, so that they may have the benefit of them.

Objection. The defendants receive no *premium* from the plaintiff.

Answer. The plaintiff gives a *premium*, which intitles him to a remedy; and against whom shall he have it, if not against the publick officer, against the post-master general, by whose negligence he suffers. 2. The defendants receive a *premium*, viz. a salary of 1500*l. per annum* (which is a sufficient reward) paid out of the profits of the office. And therefore this case is not distinguishable from the case of *Mors v. Slue*, 1 *Ventr.* 190, 238. *Raym.* 220. in which case the objection was, that the master of the ship did not receive the freight to his own use; but yet adjudged, that he was liable for the goods of which the ship was robbed in the river: and the reasons given were, 1. because he was an officer known; 2. because he received his salary out of that which was paid for freight; both which reasons hold in this case.

Objection. The master of the ship might take caution, &c. the post-master general cannot.

Answer. He did not know how the master of the ship could take caution, &c. It was said in the case of *Mors v. Slue*, that if a man came to lade goods at an unseasonable time, he was not obliged to take them in, as before he was ready to sail. But if he takes them in before, and they are lost, he will be liable to an action. So a common carrier may refuse to admit goods into his warehouse, before he is ready to take his journey; but yet neither the one nor the other can refuse to do the duty incumbent upon them by virtue of their publick employment.

A common carrier may refuse to admit goods into his warehouse.

3. This case is within the same reason and equity upon which the cases are founded, in which men are chargeable for negligent keeping; and this is the reason, that if they should not be charged without assigning a particular neglect, they might defraud any man, and he would not be able to prove it; and that is the reason of the cases of carriers, &c. And this reason is given in *Justinian, lib. 4. tit. 5. Minsinger. comment. fol. 5617*. Such matter is transacted among

among a multitude of people, and therefore no particular of them can be charged; and therefore the officer ought to be charged, who chuses such inferior officers. The case of *Mors v. Slue* was harder, because there the servants were overcome by a superior force.

Objection. The common carrier may sue the hundred, the post-master general cannot sue any body.

Answer. That is no reason, because a carrier was chargeable before the statute of *Winton*, at which-time he could not sue the hundred. Besides, that he is liable, where he has no remedy against the hundred; as for goods lost out of his warehouse, or out of his waggon in the yard.

Objection. The inn-keeper is only chargeable for goods in his custody within his inn, and not for a horse put to graze, and therefore it differs from this case.

Answer. Here the letter was within the walls of the post-house. But the case of the innkeeper is stronger, because he is obliged, while he has room, to let in all travellers. But *econtra* of the post-master general, who may chuse his deputies and servants.

Objection. The inn-keeper has people up all the night in the inn.

Answer. And the post-master general also in the post-office.

Objection. The case of Sir *Henry Herbert* and Mr. *Paget*.
1 *Sid.* 77. *Raym.* 53.

Answer. There *prima facie* they held the defendant chargeable; but afterwards they were of opinion for the defendant, that he was not chargeable, because the clerks of Mr. *Henley* had liberty to enter into the treasury without his consent, and so the access to the records was not confined to his servants only. But here no body could enter into the post-office but the servants of the defendants only. This case differs from the loss of a letter upon the road, but to that he gave no opinion; for a carrier receives goods, safely to keep, and safely to carry; but the post-master general receives the letters, safely to keep and send; so that there may be a question, whether the post-master shall be chargeable, when he has safely sent the letters out of the office. But admit that he should not be liable, when the post-boy is robbed upon the road; yet it will not follow, that he is not chargeable for letters taken out of the office. In the

case of *Morse v. Slue*, if the ship had been at sea, the master would not have been liable; yet it does not follow, that he shall not be chargeable for a loss at land. If a man comes to an inn, and orders the inn-keeper to put his horse into the stable, being hot, and to let him cool, and then to put him to grass; because the inn-keeper should not be chargeable, if he were stole after he is put to grass, it does not follow from thence that he shall not be chargeable, if he be stole before he be turned to grass, whilst he is in the stable.

4. It is the duty of the post-master to receive exchequer bills, and to send them by the mail. For he ought to receive such packets as are proper to be sent by the post; and such are exchequer bills.

Case against a man who has a publick employment, for refusing to execute it, to any damage.

1. If a man takes upon him a publick employment, he is bound to serve the publick as far as the employment extends; and for refusal an action lies, as against a farrier refusing to shoe a horse. *Keilw.* 50. against an inn-keeper refusing a guest, when he has room. *Dier* 158. *pl.* 32. against a carrier refusing to carry goods, when he has convenience, his waggon not being full. He had known such action brought, and a recovery upon it, and never disputed. So an action will lie against a sheriff, for refusing to execute process. The same reason will hold, that an action should lie against the post-master, for refusing to receive a letter, &c.

2. Exchequer bills are proper to be sent by the post. The act does not confine it to any specific thing, but generally of packets. It appears, that the act intended that other things should be sent by the post, as well as letters. By the words of the act, deeds and other things. Also Exchequer bills are light. And a pearl-necklace of 1000*l.* value may be sent by the post.

Objection. Exchequer bills are new things created by act of parliament.

Answer. A new interest created by a subsequent statute will be under the same remedy as a thing *in esse* before of the same nature. *4 Co.* 4. *a. Vernon's case*. And one may as well say, that trover or trespass will not lie for them, because they are new things. Bills of exchange might have been sent by the post, and Exchequer bills are like to them. A bill of exchange payable to a man or bearer is a lawful bill of exchange, and may be sent by the post, as well as one payable to a man or order.

Objection.

Objection. That the post-master will not be chargeable for bills of exchange lost, because they are excepted out of the act, that nothing shall be paid for them.

Answer. That the letter ought to be intended to be written for the sake of the bill, and therefore payment of the letter is payment for the bill. As where a man comes to an inn, he shall pay nothing for the keeping of his goods; yet the advantage which the inn-keeper hath by the presence of the guest, makes him liable.

3. Exchequer bills are not excepted, and therefore shall pay postage.

4. The defendants being publick officers are chargeable, though they had no benefit; as the sheriff, though he has no fees for suing of executions. For where the law gives a man custody of a thing *virtute officii*, it obliges him to keep it safely. And therefore upon the reason of *Southcote's case*, 4 Co. 83. b. if goods are delivered to a man to be safely kept, and he accepts them, he shall be chargeable if they are lost. An officer accepts such things as come to him *virtute officii* upon this trust, and therefore he shall be chargeable for them if they be lost; and one cannot put a case of a publick officer to the contrary. The opinion in 4 Co. 83. of a general bailment, is not law; for upon a general bailment the baillee ought to keep them only as his own. 3 Cro. 815. Bailment.

5. Before the 12 Car. 2. any one might have erected a post-office, and such erector had been liable for miscarriage; and therefore this post-master is liable also; for now the act having prohibited the subjects to employ any other but this post-master general, it would be hard to deprive them of the remedy which they had before.

Objection. The plaintiff has a remedy against *Breefe*.

Answer. If it could be proved that *Breefe* took out the Exchequer bills, he agreed that it was so; likewise any stranger that took them out might be charged as a *tort-feasor*; but *Breefe* cannot be charged as an officer for neglect: for misfeasance of a deputy an action will lie against him, but that is not *qua* officer, but *qua* *tort* gaoler. *Escape against* *feasor*. And according to this is the difference between a negligent and a voluntary escape. A gaoler is liable to an action for the latter, but not for the former. 1 Leon. 146. Cro. Eliz. 175, 743. 1 Roll. Rep. 78. This office is manageable only by them, their deputies and servants, and what is done by a deputy, is done by the principal;

principal; and reasonable, because the principal may remove the deputy at pleasure, though he puts him in for life, for it is contrary to the nature of a deputy, not to be removable. *Hob. 13. More 856.* A deputy may forfeit the office of the principal; as if he does such acts as would be a forfeiture in the principal. *39 Hen. 6. 34.*

Objection. *Dier 238.*

Answer. It is (by him) directly contrary to the purpose, for which his brother *Gould* cited it.

Objection. This will be to make the defendants responsible here for the servants of the deputies.

Answer. If a deputy has power to make servants, the principal will be chargeable for their misfeasance, because the act of the servant is the act of the deputy, and the act of the deputy is the act of the principal. But here *Breefe* is the servant of the defendants themselves.

Objection. The defendants are but fellow-servants with *Breefe*, because all receive their salaries from the King.

Answer. He is appointed by the defendants, and is their servant, and removable by them, though they do not pay him his wages. But then suppose that *Breefe* is not a servant of the defendants, then it will be stronger against the defendants, for then *Breefe* will be as a stranger, and then they will be the rather liable, the act appointing them to manage the office by their servants.

Objection. *Powys* justice compared the defendants to a captain of a company; and he shall not be chargeable for the cowardliness of his foldiers, no more shall the defendants for the negligence of *Breefe*, admitting him to be their servant.

Case against the captain of a company for having cowardly foldiers. Answer. If *A.* received a particular damage by the cowardliness of the foldiers of a captain, he shall be chargeable; but in such case the prejudice is national. But the master of a ship is liable for the neglect of his mariners.

Objection. The act did not intend that the defendants should be chargeable.

Answer. He was of a contrary opinion, because all the power is placed in the post-master general. And when a statute erects a new office, and places it under such circumstances, as in consequence of

of law make the officer liable; it must be presumed to have been their intent, that he shall be chargeable.

2. It appears by the words of the act, that they intended that the dispatches should be safe.

3. It appears by the act, that it was the judgment of the parliament, that they were liable for the fault of the deputy. *Par. 3.* It is provided that the post-masters general, and their deputies, &c. Then *par. 10.* a penalty of 5*l.* is imposed upon the post-master, if there be a failure of furnishing with post-horses; from whence it appears, that the parliament looked upon the fault of the deputy to be the fault of the post-master.

Objection. This will ruin the office.

Answer. It will make them more careful.

Objection. This will encourage frauds.

Answer. The method to prevent them is to make the post-master liable.

Objection. The plaintiff might have sent his Exchequer bills by some other means.

Answer. That will not excuse the defendants; no more than it will be an excuse to an inn-keeper, that his guest, who has lost his goods, might have gone to another inn.

Objection. The *premium* limited by the act is too small.

Answer. The defendants have accepted the office upon those terms.

Objection. The patent is, that they shall observe the orders of the King under the sign manual, and the orders of the treasury concerning the revenue.

Answer. Their observance of the orders of the Treasury will not interrupt their care of the letters; and if a prejudice happen by observance of the King's orders, that will not excuse; because they are obliged to observe the most convenient methods for the execution of the office according to the directions of the act, and the patent cannot excuse them in any neglect of that.

Objection. There is a clause in the patent, that the post-master shall not be answerable for a fault in their deputy, but only for their own act.

Answer. That is only intended of imbezilment of the revenue by their deputies, and as to that the said clause will excuse them; but it will not excuse them from any remedy that the subject hath against them for his benefit by the law. And no *non-obstante* in such case will avail, nor any charter of exemption. And for these reasons he concluded, that judgment ought to be given for the plaintiff. But the other three judges being of a contrary opinion, judgment was given for the defendants. But however, the plaintiff intending to bring a writ of error upon the said judgment, the defendants seeing that, paid the money to the plaintiff, as I was informed.

Parker vers. Kett.

S. C. 1 Salk.
95.
Comyns 84,
85.
12 Mod. 467,
470, 690.
A steward of
a manor with
power to
make a de-
puty makes B.
his deputy;
B. by writing
under his hand
and seal makes
C. his deputy,
to the intent
to take a sur-
render of G.
of copyhold
lands; C.
takes the sur-
render accor-
dingly out of
court, and
well.

IN ejectment brought for lands in *Tresingham* in *Norfolk*, on the demise of *Charles Kett*, the cause was tried before *Holt* chief justice of the King's Bench; and he making some difficulty in the point of law arising upon the evidence, he reserved it as a point for his consideration, and afterwards gave order that it should be argued in *B. R.* to have the opinion of all the judges of the said court. And it was argued accordingly several times, by Mr. *Williams* and Mr. *Weld* of one side, and Mr. *Broderick* and Mr. *Northey* of the other side. And now the chief justice pronounced the opinion of the whole court. The case was thus: *Charles Kett* copyholder in fee of the lands in question held of the manor of *Reswick* in *Norfolk* made his will, and thereby devised these lands in question to the defendant *Elizabeth* his wife for her life, remainder to his son *Charles* the lessor of the plaintiff in tail, remainder to his wife in fee. Mr. *Samuel Keck* the master in Chancery was constituted steward of this manor by patent, to exercise the said office by himself, or his sufficient deputy; by virtue of which power *Keck* made *Osman Clerke* his deputy steward, and he had executed the said office many years. *Charles Kett* the father being sick, sent to desire *Osman Clerke* to come to him, to take a surrender of these lands to the use of his will; but *Clerke* not being able to come himself, by writing under his hand and seal appointed *Thacker* and *Ballaſton* to be his deputies jointly and severally, only to take this surrender. Accordingly *Ballaſton* took the surrender of *Charles Kett* out of court to the use of his will. And at the next court, which was after the death of the surrenderor, this surrender was presented before

before *Osman Clerke*, and *Elizabeth Kett* the defendant was admitted by *Osman Clerke*. Upon which *Charles Kett* demised these lands to the plaintiff in order to bring an ejectment, to try the title; supposing that this surrender was void, being taken by the deputy of a deputy-steward out of court, &c.

But *Holt* chief justice declared, that all the judges of the King's Bench were of opinion, that this surrender was a good surrender. And in delivering this resolution he said, that two questions had been made in the arguments at the bar.

1. Whether *Ballaſton* had a good original authority to take this surrender.

2. Supposing that he had not, yet whether this defect was not cured by the intention of the law, or by subsequent acts.

And as to the first point they held, that *Ballaſton* deriving his authority from a writing under the hand and seal of the deputy-steward, had a good original authority. For where an officer has power to make a deputy, such deputy (when he is created such) may do any act, that his principal might do; and less power he cannot have. *Hob. 12. Norton v. Sims*, in case of an undersheriff; which case goes farther, because there the covenant that the undersheriff should not execute any execution for more than 20*l.* without the special warrant of the high sheriff, was held void, because it was repugnant to the nature of the deputation. Then here if the steward could have given such a power (and that was never doubted, but that he might have impowered a man, to have taken a surrender out of court; and such person is not a deputy, having only power to do one single act, whereas a deputy by the nature of the deputation has power to do all acts) *Osman Clerke* as deputy for the reasons aforesaid might do the same thing. And it is but the common case of undersheriffs, who have power to make bailiffs, and to send process, all over the kingdom, and that only by virtue of their deputation.

Objection. That the case of the undersheriff is not parallel, because he acts in the name of the sheriff, but here *Clerke* has acted in his own name.

Answer. It is necessary, that the undersheriff act in the name of the sheriff, because the writs are directed to the sheriff, and therefore acting under the said writs, he must make use of the name of the sheriff. But here the deputy-steward has a general power, and therefore it is not requisite, that he do the acts in the name

name of *Keck*. But 9 Co. 76. b. may be objected, where it is held, that he who acts as attorney, ought to use the name of his principal; but it will be good, as it is done here; for in *Coomb's* case the point of the case was otherwise determined, for there the surrender was made by the attornies in their own name; and there being sufficient authority, it will be good, though it is not so regular and formal. But the entry should have been, *A. the copyholder by B. and C. his attornies surrendered, &c.* for the act of the deputy is the act of the principal; and all the entries in the King's Bench upon record are, *A. per B. attornatum suum queritur, &c.* and if that had been done in this case it had been more formal, but yet this is substantial.

Diversity. Objection. Farther, in *Coomb's* case the authority was recited, which is not done here, but he seems to act as principal, whereas he ought to have shewn his deputation by way of recital in the appointment. But notwithstanding this objection it is good. For where a man does such an act, as cannot be good by any other means but by virtue of his authority, it shall be intended to be an execution of his authority; but where a man has an interest and authority, and does an act without reciting his authority, it shall be intended to be done by virtue of his interest. 6 Co. 17. Sir *Edward Clere's* case. So here the constituting of *Ballaston* by *Ofman Clerke* as his attorney will be good by his authority, without reciting it, because otherwise it would be of no avail. Besides, that a deputy may hold a court either in his own name as deputy-steward, or in the name of the steward, and so for the same reason he might make this appointment in his own name. But it is objected farther, that he calls them deputies in his appointment, &c. and a deputy cannot make a deputy, nor can a deputy be made to do any single act.

Deputy steward may hold a court in his own name.

Answer. It appears sufficiently, what *Clerke* meant, viz. that they should be his servants. And there are also words large enough in the appointment, to comprehend it. And the case in *Cro. Eliz.* 533. rules it; for the reason there was, because he was a servant, and the deputy of a ministerial officer may appoint a servant. And therefore for these reasons they all held the surrender to be originally good.

Steward de facto.

2. They held, that admitting that the authority originally was defective, yet they were sufficient stewards *de facto*, and the surrender for that reason good. Doubtless a steward *de facto* may take a surrender. Then such steward is no other, than he who has the reputation of being steward, and yet is not a good steward in point of law. Now here *Clerke* was a good deputy. Now suppose,

pose, that he had made *Thacker* and *Ballaſton* deputies absolutely, which would have been void; yet it would have given *Thacker* and *Ballaſton* the reputation of being good stewards; and a surrender to them, and a presentment afterwards in court, and admittance made accordingly, would be good. The case of *Knowles v. Luce*, *Moore* 109, 110. is a case strong in point. The case there was; there were two joint stewards, one of them held a court, and took a surrender, and it was held good; now one of them could not act alone, but yet being named in the patent, it gave a colour and reputation to the thing; there *Manwood* delivered the opinion of the court, and said that there was a difference between a copyhold granted by a steward who has a colour and no right to hold a court. and a steward who has neither colour nor right; for if a colourable steward assembles the tenants, and they do their service, the acts are good that he does, as an under steward after the death of the chief steward, or the clerk of the lord of the manor who holds court without the contradiction or disturbance of the lord, though he has no patent, nor any express authority to be steward; and the reason is this, because the tenants are not obliged to examine the authority of the steward whether it be lawful or not, nor is he compellable to give account of it to them. Now in this case *Thacker* and *Ballaſton* without doubt had an authority as good as the deputy of a dead steward or the lords clerk. And this is agreeable to the reason of the law in other cases, as a legal act done by an executor *de son tort* will bind the rightful executor. 5 Co. 30. b. and yet he is but an executor *de facto*; and if the rightful executor bring trover against him, he shall recover only so much in damages, as he has administered unduly; and the reason is, because the creditors are not bound to seek farther than him who acts as executor; therefore if an executor *de son tort* pays 100 l. of the testator's in a bag to a creditor, the rightful executor shall not have trover and conversion against the creditor. There is also the case of the bishop of *Ossory*. *Cro. Jac.* 554. 2 *Roll. Rep.* 101, 130. *Palm.* 22. that if a bishop *de facto* in possession grants institution, and thereupon induction is had, it will make a plenary; and yet there can be but one bishop of one diocese; but by reason of the appearance and colour, which he in possession hath of being bishop, all judicial acts done by him are good. And he concluded with the case of 1 *Leon.* 288. of the lord *Dacres* which is stronger; for the undersigning of the copy in the said case by the lord *Dacres* signified nothing, being after the grant, and could amount to no more than a declaration of his consent, or at most to a confirmation, but could not amount to a grant; and a release or confirmation of copyhold lands is of no avail in law, unless the copyholder be in by admittance, 4 Co. 25. b. but it was necessary, it being a voluntary grant, which without

such consent or confirmation had been void. Then if the grant by the steward's servant (which was the case of the lord *Dacres*) in court was good; this surrender taken out of court, and afterwards presented in court, and admittance made in pursuance of it, will be good also. And a rule was made, that the verdict, which was given for the plaintiff for his security in this case, should be set aside, and that the defendant should have her costs.

Thorpe vers. Thorpe. Ante 235.

Intr. Pasch. 12 Will. 3. B. R. Rot. 253.

S. C. 2 Salk.
171.

1 Lutw. 245.

S. C. Comyns
98.

S. C. 12 Mod.
445, 452.

*Indebitatus
assumpsit* for
release of an
equity of re-
demption in
mortgaged
lands.

March 203.

Godb. 203.

Jenk. 324.

P. 37.

7 Mod. 13.

ERROR of a judgment in C. B. In *assumpsit* the plaintiff declares, that 19 Jan. 1693. the defendant held of the plaintiff certain lands *per modum mortgagii*, and that there was a discourse between the plaintiff and defendant concerning the said mortgage, and that the plaintiff should release his equity of redemption, and thereupon the plaintiff agreed to make a good and sufficient release of his equity of redemption, *in consideratione cujus* the defendant agreed to pay the plaintiff 7*l.* and that the defendant in consideration of the agreement aforesaid, and that the plaintiff would perform his part of the agreement, assumed to perform his; and assign'd for breach, that although the plaintiff had performed *omnia in agreemento illo contenta ex parte* of the plaintiff to be performed, nevertheless the defendant had not paid the 7*l.* and then there is another count of *indebitatus assumpsit pro relaxatione aequitatis redemptionis* of the plaintiff, &c. To which the defendant pleaded, that after the making of the said promise, *viz.* 29 July 1694. the plaintiff released to the defendant and *Heale* all and all manner of actions, suits, causes and accounts, debts, duties, reckonings, sum and sums of money, and demands whatsoever, which the said *John* had or might have against the defendant and the said *Heale* for any matter, cause or thing whatsoever. The plaintiff prayed *oyer* of the release; and it appeared to be made between the defendant and *Heale* of the one part, and the plaintiff of the other, bearing date the 29 July 1694, and recited, that whereas the plaintiff had surrendered to the use of the defendant by mortgage certain copyhold lands, and had also surrendered to the use of *Heale* in the same manner a capital mesuage, and certain other lands, the plaintiff released to the defendant and *Heale* all proviso's and conditions in the said deeds, writings, and surrenders mentioned and contained, and also by the said deed for ever acquitted and released all his estate, right as well in law as in equity, equity of redemption, title, claim, and demand whatsoever to the said lands, mesuage, and all and singular the premisses, and every of them; and that

that he the said plaintiff by the said writing remised, released, and for ever quit claimed, to the defendant and *Heale*, their heirs, executors, administrators, and assigns, all and all manner of actions, suits, causes and accounts, reckonings, sum and sums of money, and demands whatsoever, which the plaintiff at any time had, &c. And after oyer the plaintiff demurred. And after argument judgment was given for him in the Common Pleas. [As see before, 235.] And it was argued several days by Mr. *Peere Williams* and Mr. *William Cowper* for the plaintiff in error, and Mr. *Raymond* and Mr. *Cbesbyre* for the defendant in error. And the counsel for the plaintiff in error argued, 1. That there was not here a sufficient consideration to maintain the *assumpsit*, because the mortgagee after the condition broken has an absolute estate in the land, and the common law does not take notice of the equity of redemption, which is a meer proceeding in Chancery, and therefore the release of it after the condition broken in the eye of the common law cannot mend the title of him, who had an absolute title before, and of consequence the release of it is no consideration. 2. Admit that the law will take notice of the equity of redemption that the mortgagor hath, and that it is a thing valuable; and consequently the release of it a valuable consideration; yet in this case the plaintiff ought to have shewn, how he was intituled to such equity of redemption; because it may be, that his equity of redemption was not valuable, and then a release of it will not be a valuable consideration; as if the mortgage was for the whole value of the land; or if this mortgage was made, that the mortgagee should have the land, until he was satisfied his money by perception of the profits; in this case the mortgagor would have an equity of redemption, and yet it would not be valuable. But *Holt* chief justice said, that the last case would not be a mortgage; and all the court held, that without doubt a release of an equity of redemption is a very good consideration, and the common law will take notice, that the mortgagor has an equity to be relieved in Chancery. See *Cro. Eliz.* 768. 2 *Bulst.* 41. 2 *Ventr.* 214. Roll. Abr. 23.

2. It was argued by the counsel for the plaintiff in error, that this release shall not be restrained by the recital, but shall be construed as a general release, and so the plaintiff in the original action barred by it. And for this was cited the rule taken in *Altham's* case, 8 Co. 148. *generalis clausula*, &c. 9 *Edw.* 4. 4. b. *Bro. release* 29. 19 *Hen.* 6. 4. b. *Plowd.* 289. b. and that every man's deed shall be taken most strongly against himself.

But against this it was argued by the counsel of the other side; that where there are general words all alone in a deed of release, they shall be taken most strongly against the releasor; but where there

3 Cro. 182.
9 Edw. 4. 43.
Raym. 393.
Hob. 74.
Dier 240.

there is a particular recital in a deed, as here, and then general words follow, the general words shall be qualified by the particular recital; and so it has been oftentimes adjudged. And to prove this were cited 2 Roll. Abr. 409. pl. 3. 2 Saund. 414. 1 Anderson. 64. Digg's case. 3 Mod. 277. Cole v. Knight. But to this point the court gave no opinion, though the judgment in the Common Pleas was given only upon this point.

3. The third matter, and which was principally urged by the counsel for the plaintiff in error was, that this action is not founded upon the making of the release, but upon the promise to make it, and consequently the plaintiff in the original action had right of action at the time of the promise made, and then the release coming afterwards released it, and was a good bar of this action. March 75. Hob. 88. Cro. Eliz. 343. All which books prove, that the cause of action arose upon the promise made. Cro. Eliz. 703, 889. Cro. Car. 19. But if it should be admitted, that the cause to have this action arose upon the making of the release, because the release was the consideration of the money to be paid, and so this release could not be a bar of it; yet the declaration will be erroneous, because then the making of the release being the consideration to maintain this action, it ought to have been shewn how it was made specially; and a general performance averred, as here, is not sufficient; and consequently the judgment of the Common Pleas is erroneous.

But against this it was argued by the counsel for the defendant in error. Of which opinion was the whole court. And Holt chief justice pronounced the reasons of their opinion, and that judgment ought to be affirmed.

He agreed, that if the plaintiff could have an action upon this promise, before he made the release; then this release would bar the plaintiff. But *e contra*, if the plaintiff could not have had an action upon this promise before the release made, then the plaintiff cannot be barred of his action by the release made; because the plaintiff will be intitled to his action only by the making of the release, and before that no promise was broken by the defendant. Cro. Jac. 777. Hancock v. Field. A release of all demands will not discharge a covenant before it is broken. 5 Co. 70. Hoe's case. The question then will be, whether the plaintiff could have maintained his action against the defendant before the making of the release.

Where there are mutual promises, it is not necessary, to aver performance of the consideration.

It was objected by Mr. Cowper, that there are here mutual promises, and in such case the one is the consideration of the other, and then the plaintiff is not obliged to aver performance of his part.

3

Answer.

Answer. That is true, but it depends upon the words of the agreement. If there had been a positive agreement, that the plaintiff should release, and that the defendant should pay 7*l.* the plaintiff might have maintained an action, before he had made the release. But here the promise is *in consideratione cuius*, which makes the release on the part of the plaintiff to be a condition precedent. Condition precedent. He agreed the case of *Nicholls v. Raynbred*, *Hob.* 88. where there are positive agreements. But if the agreement be, that the one shall do such an act, and that for the doing thereof the other shall pay 10*l.* there the performance of the act is a condition precedent, and he cannot have an action against the other for the money before performance. 15 *Hen.* 7. 10. *b.* But this rule depends upon many distinctions.

1. If a day be appointed for payment of the money, and the day comes, before the thing, for which the money is to be paid, can be done; there though the agreement be, to pay the money for the doing of the thing, yet the action may be brought for the money before the thing done; because the agreement is positive, that the money shall be paid at the said day. And agreeable to this is 48 *Ed.* 3. 2, 3. cited in 7 *Co.* 10. *b.* *Ughtred's* case; though the case there is put more generally, for there the money was to be paid upon days certain, which would happen, or at least might happen, before the service was performed. To the same purpose are 1 *Ventr.* 147. *Large v. Cheshire.* 2 *Saund.* 319. *Pordage v. Cole.*

2. Though a day certain be appointed for payment of the money, yet if the said day is to incur after the time, in which the consideration ought to be performed, for which the money should be paid; the performance of the consideration ought to be averred in an action brought for the money. So *W. Jones* 218. *Russell v. Ward*, ought to be understood. The case there indeed is intricate, but upon consideration it proves that for which it is cited. And *Dier* 76. *pl.* 30. is in point. There have been contrary cases upon the authority of *Ughtred's* case, and in *Roll. Abr.* 414, 415. there are several of them put together. The first case there is that of *Gurnell et al' v. Clerke*, upon a charter-party; and as the case is put there, *non constat* at what time the day of payment was to happen, before or after, &c. so that the case can be no great authority; but then the said case, which was adjudged 7 *Jac.* 1. *C. B.* was afterwards 9 *Jac.* 1. upon error brought in *B. R.* reversed for this very reason, because *pro tota transportatione* made a condition precedent. 1 *Bulstr.* 167. The next case is that of *Layton v. Dixon*, 1 *Roll. Abr.* 415. *Mich.* 15 *Car.* 1. where *A.* covenants with *C.* that *B.* shall convey land to *C.* and *C.* *pro consideratione praedicta* covenants to pay to *B.*

B. 1601. there it is held, that *C.* is obliged to pay the money, although *B.* does not convey. But the said case is not parallel to the case in question, because in that there is an express covenant by *A.* that *B.* shall convey to *C.* and then *pro consideratione praedicta* there must not be understood in consideration of the conveyance, but in consideration of the covenant of *A.* that *B.* should convey. There is another case in the same page between *Vivian* and *Shipping*, which is a strong case (as he said) against his present opinion; and the same point in effect is said to be adjudged, *Hil. 11 Car. 1.* between *Hayes* and *Hayes*. But the said case of *Vivian v. Shipping*, as it is reported, *Cro. Car. 384.* is directly contrary; for there *Jones* and *Berkley* justices held, that it was a condition precedent, against *Croke*. And in the case of *Hayes v. Hayes*, as it is reported, *Cro. Car. 433.* there is no such point.

He considered then the reasonableness of the cases, that are founded upon mutual remedies. And (by him) the bargain of every man ought to be performed as he understood it; and if a man will make such an agreement, as to pay his money before he has the thing for which he ought to pay it, and will rely upon the remedy that he has to recover the said thing, he ought to perform his agreement. But on the other hand, if his agreement was otherwise, there is no reason that he should be compelled to give credit, where he did not intend it. And therefore if two men agree, the one that the other shall have his horse, and the other that he will pay 10*s.* to him for the horse; because the one may have an action for the horse, yet there is no reason that the other should have an action for this money, before the horse is delivered. Therefore (by him) it is very dangerous to admit proof of mutual promises, unless they are reduced to writing; for if upon discourse *A.* and *B.* agree, that *A.* shall buy, &c. and *B.* shall sell, &c. in evidence this ought not to be looked upon, but as a bare communication, *Dier 30. pl. 203.* because such exposition of mutual promises in such case would be very dangerous to trade. Otherwise if it be put in writing, for then it shall be reckoned the folly of the purchaser, to agree to pay his money, before he has the consideration of it delivered to him. There is another case 2 *Mod. 33. Smith v. Shelden*, against his opinion; where the plaintiff agreed to assign a term for years, &c. to the defendant, and the defendant *proinde* agreed to pay to the plaintiff 250*l.* and there the court held, that the action would lie without averring performance, upon the authority of *Ughtred's* case, without regarding the authorities now cited by him; and they also founded their judgment upon a case in *Stile 186.* which is intirely different; for there is no trust in the said case, but two distinct acts are to be done, the performance of one of which does not depend upon the performance of the other; nor is the one the

the reward of the other, for then there would be a dependance; but the one ought to do his part, and the other his. But it is otherwise where the one thing is the consideration of the doing of the other; as here the money ought to be paid in consideration of the release, and therefore the execution of the release is a condition precedent to the payment of the money; and so until such time as the release was executed, nothing was due, and therefore nothing could be released.

As to the objection to the declaration, that the plaintiff has not sufficiently averred, that he has made a release, &c. for he ought to have shewn how he had done it, to the end that the court might judge, whether it was done according to the agreement. He answered, that the declaration in this respect might have been better; but nevertheless the plaintiff has averred it in general, by saying, *quod performavit omnia in agreemento illo contenta ex parte sua performanda*, though not so formerly. But then the defendant by pleading of the release has admitted that it was done, and aided this defect in the declaration. The plaintiff in his declaration ought to have shewn the time and place, when and where the release was executed, and how the equity of redemption was released; and for want of that, this declaration had been ill upon a demurrer. But now the defendant has admitted the declaration to be true, by his plea of the release. There are stronger cases than this of general declarations aided by pleading over. 3 Hen. 6. 8. 9 Hen. 6. 16, 18. Pasch. 23 Car. 2. B. R. *Bernard v. Mitchell*. 1 Ventr. 114, 126. such a general declaration held good after plea pleaded; and the case of *Vivian v. Shipping*, 1 Roll. Abr. 415. aforesaid, is a case in point, that such general averment, viz. that the plaintiff had performed all things that were on his part to be performed, was good after plea pleaded. So here, there not being any duty or demand before the release was executed, the release cannot operate upon it. Therefore judgment was affirmed.

Fault in a declaration aided by pleading over.

Cro. Car. 384.

Freke *vers.* Thomas.

DEBT upon bond brought by administrator *durante minori-* Ante 338.
tate of an administrator. Upon demurrer to the declaration, S. C. 1 Salk.
 Mr. Comyns for the defendant took exception, that it appeared upon 39.
 the declaration, that he, during the minority of whom administra- S. C. Comyns
 tion was granted to the plaintiff, was above the age of seventeen, 110.
 and so the administration determined. That this case does not differ Administration during
 in reason from the case of an administrator during the minority of the minority
 an executor, which determines at the age of seventeen, 5 Co. 29. of an admini-
 nor from the case where a woman executrix under the age of seven- strator does
 teen not determine
 before the age
 of 21 of the
 administrator.

teen marries a husband of the age of eighteen, nineteen, &c. For the only thing that the law considers, is the ability of the person to administer the estate of the dead, who ought to have the administration of it, which ought to be the same in both cases. And in *Vaugb.* 98. the rule of averment of the age of an administrator or executor to be under seventeen, is equally put of both. And the statute of distributions will make no difference, because an infant may find sureties, though he cannot be bound himself. *Sed non allocatur.* For *per Holt* chief justice, there is a difference between administration *durante minoritate* of an executor, and of another person; for an administrator during the minority of a residuary legatee ought to be understood to be during his legal minority. For the authority that the administrator hath, is given to him by the statute; and an infant hath not been adjudged a legal person, to be intrusted with the management of an estate. But an executor, who comes in by the act of the party himself, hath been adjudged capable to administer at seventeen. But the law in the exposition of a statute will not make such construction. And care is taken of the administration, by the commission of administration during his minority to his next friend. And this is the opinion of the civilians, and it has been held accordingly by commissioners delegates. And therefore judgment was given for the plaintiff.

Fox *vers.* Wilbraham.

Intr. Trin. 12 Will. 3. B. R. Rot. 353.

Uncertainty.

Covenant against the assignor of a term, upon a covenant that the lease was free from incumbrances, and that the assignor had not done nor suffered, &c. and the breach assigned was, that at the sessions held at *Chester*, 4 *Jac.* the defendant was outlawed. Upon demurrer the declaration was held ill, because it was not shewn, in the time of which King *James* the outlawry was. For *per Holt*, the pleading ought to be very certain, as to shew in what term the outlawry was; but this uncertainty of the King's reign was greater. Mr. *Chefkyre* for the plaintiff urged, that the time was immaterial; because if there was a record of outlawry at another time, the judges would certify it, and such certificate would be good. *Hob.* 179, 209. *Keilw.* 193. 1 *Brownl.* 58, 74. But nevertheless the declaration was for this exception held ill. But the court would have perswaded the defendant, to consent, that the plaintiff should amend; but he refused. Then the court gave day to Mr. *Chefkyre*, to search precedents, that they might grant an amendment without the defendant's consent. And at another day he said, that by the statute of 14 *Edw.* 3. the judges may amend a word

No amendment after demurrer.

word mistaken by the clerk; which by 8 Hen. 6. cap. 12. was extended to the case in question, that this mistake was the clerk's, in transcribing the record. And he cited *Cro. Car.* 147. *Holt*: The case there was after verdict. *Chefbyre*: The words of the act are, challenge of the party, which must be understood of a demurrer. *Holt contra*. Challenge of the party is for arrest of judgment. But it would be hard, to spoil the defendant's demurrer, where he perhaps demurred for this cause. If the defendant should join issue, the plaintiff might amend. After error brought, after verdict he shall amend, or after a plea in abatement, because that is not final. And the amendment was denied, but the plaintiff had leave by the court to discontinue. *Ex relatione m'ri Jacob*.

Amendment
after plea in
abatement.

Palmer *vers.* Stavely.

Indebitatus assumpsit for money had and received by the defendant for the plaintiff, to the use of the defendant. *Non assumpsit* pleaded. Verdict for the plaintiff. And now Mr. Mountague moved in arrest of judgment, that the plaintiff had no cause of action, the money being received for the use of the defendant. Mr. Brantwaite and serjeant Hall compared this to the case of *Nesworthy vers. Wildman*, 1 Mod. 42. 2 Keb. 615. and said, that being for money received, it shall be intended that the defendant ought to use it, but that nevertheless he should be answerable to the plaintiff for it. 1 Sid. 306. Where the plaintiff *assumpsit solvere*, instead of the defendant, and held good. That the words, to the use of the defendant, should be rejected after verdict, being inconsistent with the finding of the jury. *Holt*: We must reject the words that are insensible, and retain those that are sensible. Money received by the defendant for the plaintiff is good, and then the words, to the use of the defendant, must be rejected. And judgment was given for the plaintiff, *nisi*, &c.

S. C. 1 Salk.
24.

S. C. Comyns
115.
S. C. 12 Mod.
510.

Indebitatus assumpsit for money received by the defendant to the use of the defendant.

5 Will. & Mar.
B. R. Patison
v. Milton.

Proctor *vers.* Johnson.

Intr.

Will, 3.

Rot. 341.

ERROR C. B. A *scire facias* was brought against the defendant upon a judgment in ejectment obtained against the casual ejector, suggesting that the defendant since the said judgment *ingressus est modo tenet*, &c. The defendant being warned comes in, and pleads *nul tiel record*. Upon which the record being brought in, judgment was given in C. B. for the plaintiff, *quod haberet executionem*, &c. Upon which the defendant in C. B. brought

S. C. 2 Salk.
600.

Scire facias upon a judgment in ejectment against the casual ejector lies against the terretenants.

brought error in B. R. upon the said judgment. And Pratt serjeant argued, that a *scire facias* would not lie in this case, because at common law a *scire facias* lay only in real actions. 2 Inst. 469. Against which it was argued by Mr. Chesbire, that the action well lay, and that the judgment was well given. And he cited Rest. Entr. 367, 590. Co. Entr. 630, 632. Form. placit. 328. Hume's plead. 652. b. 653. b. Pasch. 25 Car. 2. B. R. Rot. 392.

Holt chief justice. The meaning of Coke in 2 Inst. 469. is only, that a *scire facias* did not lie at common law upon a judgment for debt or damages; but this *scire facias* sounds in the realty, and a *scire facias* lay at common law upon a judgment in an action real or mixed; as a man might have had a *scire facias* at common law upon a judgment in assise. And though the term recovered is personal, *quatenus* it is a chattel; yet it is real, *quatenus* it concerns land. The reason of the *scire facias* is, because the land is bound by the recovery, and that makes a title to the recoveror. If there is tenant for years, reversion in fee, tenant for years is ousted, and he in reversion disseised; at common law the remedy for the tenant for years was ejectment, and assise for the reversioner. Then if the lessee for years obtain judgment against the disseisor for the term, that makes him a title; and if it happen, that the judgment is not executed in the life of the disseisor; the termor shall not lose the benefit of his recovery, but he shall have a *scire facias* against the terretenants; and if they have title paramount the recovery, they shall avoid it; if they claim under it, they are estopped, as for the purpose the heir of the lessor, &c. It is absolutely necessary, that a *scire facias* should lie in this case, because there is no other means to execute the judgment, if the parties die, or are changed. But in judgments for debt or damages, the judgment might have been executed at common law by action of debt upon the judgment. Therefore upon the reason of the law, without consideration of precedents, a *scire facias* will lie in this case. Upon the *scire facias* the terretenants will have notice, and *scire feci* ought to be returned; and therefore it is not so hard as the serving the tenants with a copy of the declaration in ejectment. The *scire facias* may be general against the terretenants, and leave it to the sheriff to return who are terretenants; or it may be suggested in particular, who they are, as here. And they, being strangers to the judgment, may falsify; or if they claim under the defendant, they are bound by it. Judgment was affirmed *nisi*, &c.

Mitchell

Mitchell *vers.* Harris.

IN debt upon bond, with condition to perform the award of *A.* and *B.* *ita quod* they made their award on or before the twenty-ninth of *June*, and if they made no award, then to perform the umpirage of him whom *A.* and *B.* should elect, &c. Upon *mul* *agard* pleaded, the plaintiff replies, that *A.* and *B.* upon the twenty-ninth of *June* elected *C.* to be umpire, and that he had made his umpirage, &c. and assigns a breach, &c. And upon demurrer exception was taken, that *A.* and *B.* had all the twenty-ninth of *June*, to make their award. *Sed non allocatur.* For *per Holt* chief justice, If a submission be made to *A.* and *B.* *ita quod* they make their award before Midsummer, and if they do not agree, then to such umpire as they shall chuse, so as he make his umpirage before Midsummer, and an umpirage is made accordingly, it is good; because the arbitrators have determined their power before by electing the umpire. And so it was resolved in the case of *Twisleton v. Travers.* But if the umpire be named in the submission, he cannot make his umpirage, before the time is expired, which is given to the arbitrators, to make their award. Judgment for the plaintiff *nisi*, &c. *Ex relatione m'ri Jacob.*

S. C. 1 Salk.

71.

1 Roll. Abr.

261.

2 Keb. 15.

12 Mod. 513.

If a submission

be to the a-

ward of *A.*and *B.* *ita**quod* it be

made before

the first of *Ja-*

nuary, and if

they do not

agree, then to

such umpire as

they shall

chuse, so as he

make his um-

pirage before

the first of

January;they elect *D.*

and he makes

his umpirage

accordingly;

it is good.

*Twisleton v.**Travers.*

1 Lev. 174.

Wilmot *vers.* Tyler.

THE plaintiff brought an appeal against the defendant for the murder of her husband. The defendant pleaded a conviction of manslaughter and clergy had. And after several exceptions taken to the plea by Mr. *Earle*, which were over-ruled, the question was, whether the court should give final judgment upon the plea in bar, or only judgment to abate the writ, there being a fault in it, there being only eleven days between the *teste* and return of it. And *per Holt* chief justice, final judgment shall be given. For though the writ be ill, so as an outlawry upon it would be erroneous; yet having appeared and pleaded in chief, and not having insisted upon that, he has lost the advantage of it. Now there ought to be fifteen days between the *teste* and return of original writs, and there is here but eleven. And the reason why there ought to be fifteen, is in 2 *Inst.* 267. because, every day a man may go a day's journey, which in law is accounted twenty miles, and is called *dieta*, and according to the said computation fifteen days are a convenient time for a man to appear, in whatsoever part of *England* he lives. According to this is *Braet. lib. 3.*

S. C. 1 Salk.

63.

12 Mod. 416,

448.

2 Hawk. P.

C. 185. p. 101.

Judgment final

upon a plea

in bar, where

the writ is

faulty.

12 Mod. 451.

Arraignment
in custodia
marrescalli in
appeal.

135. lib. 4. 238. And it was reasonable, that a man should have convenient time; and if he had not, the process was looked upon as too strait, and erroneous. But if the defendant appeared, and pleaded in chief, and did not take advantage of it, he made it good. 9 Ed. 4. 18. In case of a *scire facias* upon a fine, which partakes of the nature of a real action, the fine shall be good although there be not fifteen days between the *teste* and the return of the original; it appears in the said book, that this is a received doctrine, though there is some diversity of opinions. 12 Ed. 4. 11. But if the defendant pleads the shortness of the time between the *teste* and return, or in assise pleads *nient attach per quinzime jours*; then the writ will be ill: but if he answers, and does not take advantage of it, the writ will be well enough. And an acquittal upon a bad writ of appeal, or a bad indictment, is no bar. Judgment was given for the defendant. And Mr. Earle moved, that he might arraign the defendant *de novo in custodia marrescalli*, and had leave to do it, and did it accordingly. But note, that the court resented this proceeding of Mr. Earle, as vexatious, and unbecoming a man of the profession of the law; and the chief justice gave him a very severe rebuke.

Rex vers. Doufe.

Indictment
does not lie
against a man
for keeping
school without
licence of the
bishop.

THE defendant was indicted for having kept a school without licence of the bishop of the diocese, &c. *contra formam statut.* Upon which Mr. King moved to quash the indictment (being removed hither by *certiorari*) and the exceptions that he took the last term were, 1. That there was no statute, that prohibited keeping school without licence, but 1 Jac. 1. cap. 4. par. 9. and the said act prescribed a particular punishment, *viz.* forfeiture of, &c. Therefore it was not an offence indictable, being a new offence. 2. This indictment was found before the justices of peace at the quarter-sessions, and they have no power by the act, and therefore it was void. 3. This school was not within the act of James I. because the act extends but to grammar schools, and this school was for writing and reading. And afterwards in this term, after a rule made, that cause should be shewn upon notice, why, &c. the indictment was quashed.

Archer's

Archer's case.

SIR Bartholomew Shower moved for a *habeas corpus*, to be directed to John Archer of Welford in the county of Berks esquire, son of judge Archer, to command him to bring the body of Mrs. Eleanor Archer his daughter, being kept in her father's house by her father, and by him barbarously abused; upon producing a letter written by the said Mrs. Archer to her mother (who was separated from her husband) testifying that she was severely used. On the other side another was produced, by which she declared before God, and offered to confirm the truth thereof by taking of the sacrament, that he used her very well. And the court granted a *habeas corpus*, to have Mrs. Archer present in court, to examine her, returnable immediate. And at another day upon examination of Mrs. Archer herself, she affirmed, that she had no cause of complaint gainst her father; and therefore no order was made in it.

Note; Mr. Northey said, that in the case of the lord Leigh of Stoneley a *habeas corpus* was granted, only upon the letter of my lady Leigh. And per Holt, without doubt a *habeas corpus* may be granted upon the sight of a letter.

Mitchell vers. Broughton.

Intr. Hil. 12 Will. 3. B. R. Rot. 506.

IN *assumpsit* upon a special promise to transfer stock in the plaintiff declared upon an agreement in writing, by which the defendant agreed in 1692. in consideration of to transfer so much stock to the plaintiff or order upon request; and he shewed a request, &c. and averred that the defendant had not transferred. The defendant pleaded the act of 8 & 9 of this King, cap. 32. against stockjobbing. The plaintiff demurred. And it was urged, that this contract was within the said act, because, it may be, the transfer was not to be made before the day of But per Holt, the said act shall be taken strictly, because it destroys bargains, and therefore if the request was before the said day, it is well enough. A second exception was to the declaration, because the plaintiff has not averred, that the defendant has not paid to the plaintiff's order. Sed non allocatur, for that ought to come of the other side, if payment was made

Upon the
stock jobbing
act.
Ante 316.

made to the order of the plaintiff. Judgment *nisi*, &c. for the plaintiff. See the case of *Smith v. Westall*. *Ante* 316.

Horne vers. Hunter.

Intr. Trin. 12 Will. 3. B. R. Rot. 446.

Goods levied upon a *levari facias* out of the hundred court ought not to be delivered to the plaintiff.

T Respass. The defendant justified under process in the hundred court against the plaintiff, upon a plaint there levied, and judgment against him, and the goods, for which the action was now brought, levied in execution by *levari facias*, and delivered to the plaintiff in the action there, &c. The plaintiff demurred. And the plea was adjudged ill, because the goods levied in execution were delivered to the plaintiff in execution, which could not be. And therefore judgment for the plaintiff.

West vers. West.

S. C. 3 Salk.
274.
Cases B. R.
442.
Holt 559.
Waiver of the plea.

T HE plaintiff brought an action upon his case against the defendant, mayor of *Banbury*, for having made a false return to a *mandamus*, &c. The defendant pleaded, that he was not mayor at the time of the emanation of the writ. And upon motion concerning the waving of this plea, and pleading the general issue, *Holt* chief justice held, that this plea amounted to the general issue, being only a denial of a matter of fact alleged in the declaration. And *per curiam*, if a man pleads the general issue, and that is not entred; he may waive it, and plead specially within four days; and *Sunday* shall not be reckoned one of the four days. But *Sunday* is reckoned one of the fifteen days upon the return of writs, &c.

Cheesly vers. Baily.

S. C. 1 Salk.
72.
S. C. Comyns
114.
Submission to an award in pursuance of the late act.

T HE parties entred into mutual bonds, with respective conditions, that they respectively should stand to the award to be made by J. S. of, &c. and if they should consent, to make that submission by rule of court, according to the late act of parliament, that then the bond should be void. And now a motion was made, that this should be made a rule of court, upon affidavit of the execution of these bonds. But it was opposed by Sir *Bartholomew Shower*, because it was only parcel of the condition, and his client would rather forfeit the penalty of the bond.

bond. And *per curiam*, the consent to make a submission a rule of court ought not to be a part of the condition, but only inserted in the condition, by the late act. But nevertheless *Holt* held, that this was a plain evidence of the consent of the parties; and if it were not so, the condition would signify nothing; for no subsequent consent afterwards would be sufficient within the act. And a rule was made, that it should be made a rule of court, *nisi*, &c. Upon which *Shower* urged, that the award was made by the arbitrators partially. Whereupon day was given to hear both parties as to that, &c.

Trinity

Trinity Term

13 Will. 3. B. R. 1701.

Rex *vers.* Inhabitantes Mile-end.

Attachment is not grantable for non-performance of an old order of justices confirmed in B. R.

BY the act 30 Car. 2. cap. 3. which prohibits the burying in linen, under the penalty of 5 l. the one moiety of this is given to the informer, and the other moiety to the poor of the parish. *Mile-end* is a hamlet of itself, and has distinct officers, and a chappel of ease, but lies within the parish of *Stepney*. The *Jews* have a burying place there in *Mile-end*. And the justices of peace in 36 Car. 2. made an order at their sessions, that the church-wardens of *Mile-end* should give account of their receipts of the buryings arising within their precinct to, &c. to the end that there might be an equal distribution through the whole parish; which order being removed heretofore in the time of *Charles II.* into the King's Bench, was confirmed, and the church-wardens of *Mile-end* accounted accordingly for some time. But the present church-wardens of *Mile-end* not having accounted according to the said order, Mr. *Moxon* moved last term for an attachment to be granted against them, for not accounting according to the said order, it being confirmed in this court, and so a contempt of this court. And a rule was made to shew cause. And now the said rule was discharged, and an attachment denied, because application ought to be made to the justices for a new order, and that is the proper remedy. And the whole court held the order just and good.

Selby *vers.* Clarke.

MR. Broderick moved for a prohibition, to be directed to the spiritual court of to stay a suit there against the plaintiff for tithes of hay and lambs, fed, dropped and nourished upon the plaintiff's land, &c. upon suggestion of a *modus*, that in consideration that they used to pay the tenth lamb of all the lambs dropped in their parish, they used to be discharged of the tithes of all lambs there fed, &c. and as to the tithes of hay, it suggested a custom within the parish, that if any parishioner fed his sheep with his grass until June and August, that then he might mow the coarse grass, with which they fed their sheep in the winter, whereby the parson had *uberiores decimas* of the sheep, &c. And a rule was made, to shew cause wherefore, &c. And now Mr. Chesbire against the prohibition urged, that this was a plain prescription *in non decimando*, because nothing was payable, if there were not ten lambs; like the case of *Delman v. Barton*, 1 Roll. Abr. 648. C. 4. 1 Mod. 229.

But Mr. Broderick *e contra* urged, that this was a good *modus*, because by the canon law distribution ought to be made of the tithes of lambs, at the places where the sheep had been all the year; and therefore the parson not having right to every tenth lamb, because some of them might be but newly bought, the plaintiff paying every tenth lamb, might well in consideration thereof prescribe to be discharged of the lambs there fed. And he cited 1 Roll. Abr. 648. C. 1, 649. pl. 7. But *per Holt* chief justice, the tenth lamb is due to the parson by common right. And though they may make distribution in the ecclesiastical courts, that is only among the parsons themselves, but does not concern the proprietor of the land, who ought to pay the tenth lamb to the parson by the common law; and therefore this custom cannot be esteemed by this court as beneficial to the parson, and consequently it is no ground for a prohibition. But this case differs from the case cited by Chesbire, because wool is severable, and every part of it tithable, and the parson may have the tenth ounce, or part of an ounce, but lambs are intire. But this is not a prescription *in non decimando*, because under the tenth tithe is not due. And therefore this is not a *modus in non decimando*, but no *modus* at all.

2. As to the *modus* for the hay, Chesbire urged, that it was a plain *non decimando*. And for that he cited 1 Roll. Abr. 650. pl. 13. Cro. Jac. 47. Moor 683. And the court held it to be a void custom, and therefore the rule was discharged.

Parker *vers.* Atfield.

Intr. Hil. 12 Will. 3. B. R. Rot. 464.

S. C. 1 Salk.

311.

3 Danv. Abr.

385. p. 20.

394. p. 17.

S. C. 12 Mod.

527.

Debt against

an executor,

he pleads a

judgment *ul-**tra quod, &c.*

the plaintiff

replies, kept

on foot by

fraud; the de-

fendant ought

to traverse

that.

See Latch 111.

Keb. 762.

THE plaintiff brought an action of debt against the defendant as executor to J. S. upon a bond of the said J. S. The defendant pleaded in bar a judgment for 100 l. recovered against the said J. S. by J. N. in his life-time, and that he hath not assets above 5 l. which he detains *erga satisfactionem* of the said judgment. The plaintiff replies, that J. N. would have received 12 l. in full satisfaction of the said judgment, and that the defendant refused to pay it, but keeps the judgment on foot by fraud, to defraud the plaintiff, &c. The defendant rejoined, that he had not assets, but to the value of 5 l. Upon which the plaintiff demurred. And Mr. serjeant *Cartbew* for the plaintiff argued, that the rejoinder was ill; because the defendant ought to have traversed the fraud. For the plaintiff is not concluded by his allegation of assets but to 5 l. but by the plea of the judgment he admits that he has assets to the value of 100 l. the fraud not being traversed.

Acherley e contra for the defendant said, that this plea did not admit assets for 100 l. because if the defendant had not any assets, yet he ought to have pleaded this judgment, and not to have left the judgment to go by default against him. For in such case if assets afterwards should come to the hands of the executor defendant, no advantage could have been taken of that judgment not being pleaded, and so he would be liable to the said judgment, and to the plaintiff also, whereas perhaps he might not have assets to satisfy either of them. [See the case of *Rock v. Layton* before, 589.] But *per curiam*, judgment ought to be given for the plaintiff. For though it be true, that the defendant ought to plead the judgment, yet he ought also to plead truly, how much is due upon it, and that he hath not assets to satisfy. And in this case not having pleaded truly in his plea, he ought to have traversed the fraud alleged in the replication. For now by pleading over, he has admitted that it was kept on foot by fraud. For the allegation, that he has no more than 5 l. assets, does not conclude the plaintiff, but his replication ought to be answered. In this case if the defendant had joined issue upon the fraud, if it had appeared upon the trial, that the defendant had not assets to pay the 12 l. he would not have been charged, but by direction would have had a verdict for him. And *per Holt* chief justice, if there are three judgments against the testator, each one for 20 l. the executor has assets but

to the value of 20 l. if he pleads these three judgments, and one of them is ill pleaded, or upon issues joined one of them is found against the executor (though in fact perhaps he has but 20 l. which will not be sufficient to satisfy the other two judgments of 20 l.) yet by pleading the three, it is an implicate confession of assets, more than the two judgments; and therefore in such cases judgment shall be against him for the value of the said judgments. Which *Gould* justice agreed. But (*per Holt*) if the executor pleads three judgments, &c. and the plaintiff takes judgment to have execution when assets happen farther than what will satisfy the three judgments, the executor at the same time having but 20 l. and afterwards 40 l. assets come in to the executor; the executor shall not be liable, until more assets happen, because the plaintiff did not take judgment to have execution of assets generally when they should happen, but of assets over what would satisfy the judgments. But the more safe and just way for an executor, is to plead truly, how much is really due upon a judgment. And *Holt* cited *Pasch. 23 Car. 2. B. R. rot. 339. Walpole vers. Prideaux*, in point. Judgment was given for the plaintiff. *Gould* justice cited *W. Jones 91. Veale v. Gatesdon*, as a case in point, and which had been always approved.

Almanfon vers. Davila.

UPON a motion in this case *Holt* chief justice said, that he had known it held by the court, that where the plaintiff was nonsuit for want of a declaration, and afterwards brought another action for the same cause, that he should have but common bail to the said action.

Common bail in another action after nonsuit in a former.

Weeks vers. Peach.

REplevin. Avowry thereupon. And a special demurrer to the avowry. Motion was made at the side bar, to have leave to amend, *loci* instead of *locus in quo*, &c. there being two places in the declaration. And a rule was made, to shew cause, &c. And Sir *Bartholomew Shower* shewed cause, that they demurred for this reason, and that such amendment cannot be made after demurrer without consent, and he would not assent. *Cur' accord.* And the rule was discharged.

S. C. 1 Salk. 179. Lutw. 1218. Amendment after demurrer denied. Such amendments are now made every day on payment of Costs, &c.

May

May *versus* King.

Intr. Pasch. 13 Will. 3. B. R. Rot. 165.

S. C. Cases
B. R. 537.
General issue.

INdebitatus assumpsit for 50 l. The defendant pleaded, that the plaintiff and he came to an account, and that the plaintiff was found in arrear 5 s. and that then it was agreed between them, that the one should be quit against the other, except the 5 s. The defendant demurred. And exception was taken to this, that it amounted to the general issue. Against which *Cartbew* serjeant for the defendant cited 1 *Mod.* 205. 2 *Mod.* 43. as a case in point, that such plea is good. And at another day Sir *Bartholomew Shower* for the defendant said, that this was but form, and therefore good upon a general demurrer, it not being shewn for cause. He cited 21 *Ed.* 3. 17. 3 *Cro.* 900. *Cro. Jac.* 130. *Rast. Entr.* 429. 10 *Co.* 88. There are several things which may either be pleaded specially, or given in evidence upon the general issue, as a release, &c. But *per Holt*, this ought not to be pleaded specially, but amounts to the general issue, and might have been given in evidence upon it. But at another day the plea was waived by consent, and the defendant pleaded to issue.

The president and college of Physicians *versus* Salmon.

Intr. Mich. 8 Will. 3. B. R. Rot. 349.

S. C. 2 Salk.
451.
5 *Mod.* 327.
Debt by the
college of phy-
sicians.
Ante 472.

THE plaintiffs by the name of the president and college or commonalty, &c. brought an action of debt against the defendant for 5 l. per month, for having practised physick without licence. Upon demurrer to the declaration Mr. *Mountague* for the defendant argued, 1. That this action could not be brought as here, but ought to be brought in the name of the president alone, or of the college alone; the words of the charter of *Henry VIII.* of incorporation being, *quod ipsi per nomina praesidentis collegii seu communitatis*, &c. might sue and be sued, which words, *per nomina*, in the plural number, and not *nomen*, shew that they are two distinct names. Besides, that the president and college are distinct; for by 32 *Hen.* 8. cap. 40. the president of the college, &c. sheweth, &c. 1 *Mar.* 2. cap. 9. enacts, that when the president of the college, &c. shall search, &c. The charter of *Elizabeth*, which gives power to have a body, &c. to anatomize, grants to the president *collegii sive communitatis*; whereas if they had been incorporate with him, it ought to have been *collegio*.

Against which it was argued for the plaintiffs by Mr. Chubb, that they being incorporated by the name of the president and college or commonalty, and having capacity given them, to purchase by the said name; in consequence it gives them power to be sued, and to sue, by the said name. For where a corporation is created, with ability to purchase, they shall have power to sue as incident. 10 Co. 30. b. 1 Roll. Abr. 513. Then the subsequent clause which follows, &c. is not restrictive, but only additional, and will not take away the right, to sue by the name of the corporation. 11 Hen. 7. 28. Fitzb. briefs 485. 5 Edw. 4. 20. 16 Hen. 7. 1. 29 Hen. 6. 4. 44 Edw. 3. 6. b. 13 Hen. 7. 14. He agreed, that the action might be brought by the president alone, or by him and the college or commonalty, as here; but there is no precedent of an action brought by the college. And the whole court held the action well brought here. And per Holt chief justice, if it had been a new case, he should have been of opinion, that the action could not be brought in the name of the president only, but by the reason of the law they all ought to join, because they are made a body aggregate of a president and commonalty, and have power to purchase, and it is proper for them to bring actions in the name of the head and body, especially the penalty here being given to the president and college; but it has obtained, to bring it in the name of the president alone. Cro. Car. 256. But the manner here is more proper. And the resolutions in Cro. &c. are founded upon a mistake, for the word *nomina* in the said clause means only that they are several words, though as a name of corporation they are but one; and the word *et* is omitted, which is in the name of the corporation. Coke says in Sutton's hospital case, 10 Co. 29. b. that a corporation must have a name, which is true; but that ought to be understood, either by patent of incorporation, or arising from the nature of the thing; as if the King should incorporate the inhabitants of *Dale*, and give them power to elect a mayor; though no name of corporation be mentioned in the patent, yet their name ought to be, mayor and commonalty, or mayor and burgeses. The corporation of the town of *Norwich* have been ever since the time of *Henry IV.* known by the name of the mayor, sheriffs and commonalty, the patent having destroyed the four bailiffs that they had before, and erected this new corporation of mayor and sheriffs, and yet no such name is given them by the said charter.

2. A second exception was, that it was said in the declaration, *Scilicet* repugnant is void. that the defendant by the space of so many months *ante exhibitonem billae*, *scilicet* the twenty-third of *August* practised physick; &c. which was impossible; but it ought to have been from the

twenty-third, &c. To which it was answered, and agreed by the court, that the words, twenty-third of *August*, coming in after a *scilicet*, if they were repugnant to that which went before, should be rejected, and then the declaration would be good for so many months *ante exhibitionem billae*.

Exercised
physick.

3. A third exception was, that the declaration was ill, because it says, that the defendant *exercuit et adhuc exercet*, which is too general, for it ought to have specified, in what he exercised physick, to the end that the court might judge whether he exercised physick or not. Farther, that 34 & 35 Hen. 8. cap. 8. gives power to particular persons, as persons having knowledge of the nature of herbs, to practice some sorts of physick, viz. to administer drinks for the stone, &c. without incurring any penalty; and perhaps the defendant practised within the said act, and then he will be exempt from any penalty of 5 l. per month. Besides, that the jury cannot be proper judges of what is practising physick; nor can the defendant know what defense to make to a charge so general. And in *Rast. Entr.* 426. it is shewn in what, &c. To which it was answered for the plaintiffs, and agreed by the court, that the offense, made such by the act, is the exercising physick, and it is sufficient to lay it in the words of the act. As in an indictment upon 5 Eliz. cap. 4. it is sufficient to say that the defendant *exercuit* such a trade, without shewing what particular act he did. And the generality of the charge is no inconvenience to the defendant, because the proof is incumbent upon the plaintiffs. And if there is any thing contained in another act for the benefit of the defendant, he ought to plead it, or he may give it in evidence upon *nil debet* pleaded.

Debt will lie
for a penalty
in a statute for
the person to
whom it is
given.

4. A fourth exception was, that debt will not lie, it not being given by the statute, but an information at the suit of the King. Debt is given by 25 Car. 2. cap. 2. for the penalties for not having taken the oaths, and usually in all penal statutes. To which it was answered, that where a certain penalty is given by a statute, the person to whom, &c. shall have debt by construction of law. And the case upon 2 & 3 Edw. 6. cap. 13. of tithes is a stronger case, the treble value sounding in damages, and not being given in certain to any person by the words of the statute. And the case in *Cro. Car.* 256. is as the present case is. Which was agreed by the court. But *Holt* chief justice said, that the case of debt for tithes upon the statute of *Edward VI.* was at first a strain, because it gave an action of debt; whereas the statute gave but treble damages; but the party should rather have had an action upon the statute.

5. A fifth exception was, that the action was brought *Hil. 5 Will.* The *memo-*
& Mar. the entry *Mich. 8.* which was two years after the death *random no*
of the Queen, and the *memorandum* was, that they prosecute for declaration, *part of the*
the King and the late Queen. But to that *Holt* chief justice an- *and may be*
swered, that it was no part of the declaration, and might be *amended.*
amended. *Ante 324.*

6. A sixth exception was, that this action ought not to be *Tam quam.*
brought *tam quam*, no action being given to the King. *Sed non*
allocatur. For *per curiam*, the precedents are the one way and
the other.

7. The seventh exception was, that the charter confirmed by *Variance.*
the act is, that no person shall practise, &c. without licence under
the seal of the president or college; and the averment is, that he
had no licence under the seal of the president and college; which
is a variance. But held well enough. And judgment was given
for the plaintiff *nisi*, &c.

Between the parishes of Caister and Eccles.

UPON orders removed by *certiorari*, the case was thus: A S. C. 1 Salk.
poor child was bound apprentice to a man at *Caister*. He *68.*
assigned him to *B.* who lived at *Eccles*; and there he completed *Apprentice*
the service of the residue of his apprenticeship. And the question *assigned gains*
was, whether the child should not be settled at *Eccles*, where his *a settlement*
second master lived, to whom he was assigned? And the justices *with the se-*
at the sessions held that he should not, because the apprentice is not *cond master.*
assignable. But *per Holt* chief justice, though that be true, yet *S. P. deter-*
the first master might assign his apprentice; and though that would *mined between*
not pass his interest in the apprentice, yet it is a good contract, *the Parish of*
that the apprentice should serve the second master during the time, *Petrock in Com.*
though the words are only grant and assign; like the case of as- *Devon and*
signing a bond, though it be not assignable in point of interest, yet *Stoke Fleming,*
it is a covenant, that the assignee shall receive the money to his *Trin. 18, 19*
own use. To the same purpose is the case of *Deering v. Farrington,*
26 Car. 2. 3 Keb. 304. So here this assignment is a good agree- *Geo. 2. ex re-*
ment between the first and the second master, that the apprentice *lacione Servien'*
should serve the time with the second. And so it is a service as *Wilson.*
apprentice, and so makes a good settlement. *Post. 1241.*

Note, that the binding in the apprenticeship was in 1686. the
assignment in 1688. before 3 & 4 Will. & Mar. cap. 11. But
the

the chief justice did not regard the time, in delivering the relation of the court.

Blackborough *vers.* Davies.

S. C. 1 Salk.
38, 351.
S. C. Comyns
96.
Mandamus to
grant admini-
stration.

DAwbeney Bentley being possessed of a considerable personal estate, died intestate, leaving his grandmother and an aunt his next of kindred. The spiritual court granted administration to the grandmother. Upon which a motion was made for a *mandamus* to be directed to the said spiritual court, to command them to grant administration to the aunt, as more near of kindred than the grandmother. And this case was several times stirred at the bar by Mr. Broderick and Serjeant Darnall for the *mandamus*, and by Sir Bartholomew Shower and Mr. Chesbire *e contra*. And it was argued for the *mandamus*, that the aunt is more near of kindred than the grandmother, and therefore the spiritual court has no authority to grant administration to the grandmother, being contrary to the statute of Henry 8. That the ordinary having granted administration wrongfully, he ought to rectify it. That this could not have been questioned before 31 Edw. 3. cap. 11. because until the said time the administrator was but a servant of the ordinary; but now by the said statute the ordinary is obliged to commit administration to the nearest and most lawful friends of the deceased. The 21 H. 8. cap. 5. gives him election, to such of the nearest in equal degree as he will. But if the nearest of kindred at the time of the death of the intestate be disabled by attainder, &c. and afterwards the said disability is removed, the ordinary ought to grant administration to him; but if he has granted administration before, pending the disability, it is made a question in 1 Sid. 371. *Offley v. Best*, if the administration ought not to be repealed, before it be granted in the said case to such next of kin, because an interest is vested. But the difference is, where administration is committed to the next of kin, and where to a stranger. In the latter case a new administration ought to be granted without repeal of the former, and the very act of the new grant will be a repeal. 1 Anders. 303. Ow. 50. Cro. Eliz. 460. because the ordinary has never well executed his authority. And therefore though in *Packman's* case it was done upon citation 6 Co. 18. yet it does not follow, that it might not have been done without it; of which opinion is *Popham*, 3 Cro. 460. And if the ordinary ought to do it without citation, the King's Bench will grant a *mandamus*, to command him to do it; and the rather, since he has proceeded contrary to the statute. Besides, that the *mandamus* does not confine him to do it in any particular manner; therefore they may do

do it by citation, if that be more proper. Further, administration may be granted in vacation time, before application can be made here for a *mandamus*. But after great consideration a *mandamus* was denied by the whole court. And per Holt chief justice, in vacation time one may resort to the Chancery, and upon suggestion, that the spiritual court proceeds to grant administration to a wrong person, may have a prohibition issuing from thence, returnable in the King's Bench or Common Pleas. The authorities cited are grounded upon a reason that is not law at this day; for now the administrator is not a servant to the ordinary, but has a fixed interest, as well as an executor who is appointed by the party himself. Though the ordinary is restrained by the statute 21 Hen. 8. cap. 5. to grant administration to the next of kin, yet he is not so far restrained, as to make a nullity of the administration, if it be committed contrary to the direction of the act; for if it were void, all dispositions of the goods of the intestate, pending the administration, and before it was repealed, would be void; and after it was repealed, the second administrator might have trover for the goods, which cannot be. If administration be committed to a creditor, and afterwards repealed at the suit of the next of kin, the creditor shall retain against the rightful administrator, and all dispositions of the goods, &c. pending the citation, shall be good. And it is not like the case of a grant of administration by the bishop of an inferior diocese, where the intestate had *bona notabilia* in divers dioceses; for there such administration is absolutely void, but here there must be a citation to repeal the letters of administration. It would be a good return to a *mandamus*, that administration is already committed, and there is not any *lis pendens*. He said, that he would not say, that he would grant a *mandamus*, if there was a citation depending; but doubtless before that, the motion is too soon made. In the case of Sir George Sandys administration was granted to the brother, and he continued administrator for some time; then one pretended to be the wife of the intestate, and commenced a suit in the spiritual court to repeal the administration committed to the brother, because it ought to be committed to the wife; and the brother moved in the King's Bench for a prohibition, because the ordinary had power to grant administration, either to the wife, or to the next of kin; and it was held, that he should not repeal the administration committed to the brother, because the ordinary had executed his authority. There was a case between *Duncomb* and *Mason*, where a *feme covert* died intestate, leaving debts due to her, which the law would not give to her husband; and administration was granted to her next of kin, and the husband sued in the spiritual court, to repeal that administration; and a prohibition was granted, and a declaration made upon it; and the question was, whether the husband could repeal that

Prohibition to the granting administration.

Administration committed contrary to the statute is not void.

6 Co 18.

Duncomb v. Mason.

administration? and it was held, that he could: but against that the case of *Sir George Sandys* was cited; but it was held, that it did not affect the said case, because the husband had an original right by 31 Ed. 3. cap. 11. and was not within 31 Hen. 8. cap. 5. and the ordinary has no election in the case of the husband. This case was in the Common Pleas in the time of *Bridgman* chief justice.

A grandmother is nearer of kin than the aunt.

Burton v. Sharpe, Lutw. 1055.

2. They held, that the grandmother was as near as the aunt; for in this case in descent of lands it would be a mediate descent, and the same *medium* to both, viz. the father. It is enough to say, *frater et haeres*, or *soror et haeres*, which was the grand reason in the case of *Collingwood v. Pace*. And the grandmother seems to have the advantage, because she is of the right line, the aunt of the collateral line. And for these reasons the *mandamus* was denied. And Sir *Bartholemew Shower* cited a case between *Burton* and *Sharpe* the last *Trinity* term, where an administration was sued to be granted to the great grandmother; and the aunt moved for a prohibition in the Common Pleas, to stay the suit in the spiritual court, and it was denied.

Lancashire versus Killingworth.

Intr. Trin. 12 Will. 3. B. R. Rot. 359.

S. C. 2 Salk. 623.
S. C. Comyns 116.
Covenant to accept stock. S. C. 12 Mod. 530, 533.
3 Salk. 342, 343.

Tender and refusal amounts to the act done.

IN covenant for 2000 l. the plaintiff declared, that the defendant's testator covenanted with the plaintiff, upon two days notice to be given to him, to accept at any time within the year 1000 l. of the joint stock of the *Hudson's Bay* company at the *Hudson's Bay house* in, &c. and upon the transfer thereof to pay to the plaintiff 2000 l. and the plaintiff avers, that upon the second of *November* 1692 he left notice in writing at the testator's house, requiring him the fourth of *November* following (which was within the year) at the *Hudson's Bay house*, to accept the 1000 l. stock; and that the plaintiff was ready there at the day, and offered to transfer the stock, but that the testator did not come to accept it; nor hath the said testator or the defendant paid to the plaintiff the 2000 l. Upon demurrer to the declaration, and argument at the bar two or three times, the whole court held the declaration ill, and that judgment ought to be given for the defendant. And *Holt* gave the reasons of it. He said, that though the 2000 l. were payable upon the transfer, yet if a legal tender had been made by the plaintiff, he would have been as well intitled to the 2000 l. as if he had made an actual transfer. But here the tender shewn in the declaration is no legal tender.

The plaintiff says, that he was ready at the time and place, and Tender offered to transfer, but the defendant's testator did not accept it. ^{pleaded.} Now if the defendant's testator had been there, the plaintiff should have averred a refusal, as well as a tender. 16 Edw. 3. 31. 17 Edw. 3. 11. 1 Sid. 13. *Ball v. Peake* aided there by verdict. 2 Saund. 350. *Peters v. Opie*. Averment of a tender, without averment of refusal, or that it was hindered by the defendant, held ill; but aided by verdict. 2 Ventr. 109. The other way of pleading a tender is (where there are time and place for the doing of it) that he came and offered to do, &c. but the other did not come to receive, &c. *Yelv.* 38. *Hughes* case. But in this last case, where the party to whom the act was to be done did not come at the time and place appointed, the other ought to shew, that he came at the last time of the day, which time of day the law has appointed for the doing of the act, and therefore if he came before, he ought to continue there the last time; which ought to be shewn in pleading, which is not done here. 5 Co. 114. *Wade's* case. 2 Cro. 423. But in pleading of tender and refusal, any time of the day is sufficient. It has been a question heretofore, where a tender has been pleaded in the absence of the party, whether one ought not to aver, that no person came, &c. on his behalf, as well as that one ought to aver, that he did not come himself, &c. and it was pleaded without such averment, and a question made of it, but held well enough. *Cro. Eliz.* 754. *Yelv.* 38. because it shall not be intended, if he did not come himself, that any came on his part, and if any did come on his part, he ought to shew it of his side in pleading. The reason of all which is, because when a man has agreed to do a thing, he ought to use his utmost endeavour to do it; and if it be not done, he ought to shew why it is not done. Now here the plaintiff says, that he offered to do it; why then was it not done? He ought to shew, either that the testator refused, or that he did not come to the place, where, &c. at the last time, when it was appointed by the law. And this is agreeable to the reason of the law in other cases. 8 Co. 92. *Francis's* case. *A.* is bound in a bond, conditioned to infeoffe *J. S.* the obligee disseises *A.* this is no plea to the bond, because he might have entred, and made the feoffment, and the obligor is bound to do all that he can; but it would have been a good plea, that the obligee held him out by force, so that he could not enter. 3 Cro. 694. *Blandford v. Andrews*. *Intr. P.* 41 *Eliz. Rot.* 351. a case very remarkable to this purpose. And *Hob.* 77. *Austen v. Gervas*, where the consideration of a promise was, to be bound in a bond, &c. he was bound to fix the seal upon the wax, and deliver it as his act and deed, to make a sufficient tender. The law requires, that every one

one do all that he can, to intitle himself to an action, or to excuse himself from a penalty.

Objection. In these cases of transfer of stocks made in the company's books, they only attend at certain hours, as from seven to twelve, or from three to seven; and therefore it would be vain, to aver attendance at the last hour of the day, when at the said time a transfer could not be made. And this objection was made in the case of *Scales v. Signorett*. *Ante* 440.

Notice.

Answer. The law appoints the last time of the day sufficient for the doing the thing in; but if there is such particular usage, that ought to be averred, otherwise this court cannot take notice of it; as for the purpose, that they never stay at the office after six of clock; and then they ought to shew, that they were there the last time allowed by the usage, and tendered, and that would be good. But in this case, for the reasons aforesaid, the declaration is ill, and therefore judgment ought to be given for the defendant, and so it was.

Lacy vers. Kinaston.

S. C. 2 Salk.

575.

Defeasance.

Ante 419.

2 Mod. 415.

548, 550, 551.

Covenant brought by the plaintiff as administratrix of *Lacy*. The plaintiff declared upon an indenture bearing date the first of May 1676. made between *Thomas Killigrew* and the defendant and others of the one part, and the intestate of the other part; reciting, that certain articles had been made before between the same parties; and it was thereby agreed, that they should cease and become void from thenceforth; and thereupon they jointly and severally covenanted with the plaintiff's intestate, that if he should have a desire to desist from acting, and of such his intention should give notice by three months to the company; that he should be paid 6s. and 3d. per day for his life; and that after his death 100 l. should be paid within three months to his executors; but if he died before he should give notice, that then 100 l. should be paid to his executors within six months: that the intestate continued an actor until his death, and because the 100 l. was not paid within the six months after his death, the action was brought. The defendant craved oyer of the deed, and upon the oyer several agreements were shewn; and the defendant pleaded, that after the sealing and delivery of the deed in the declaration, viz. the first of May 1676. another indenture was made between *Killigrew*, the intestate, and others, of the one part, and the defendant of the other, in which deed there is the same recital, and the same articles and covenants,

as in the deed in the declaration; but that upon which he is-
sued, was a covenant by Killigrew and the intestate, &c. with
the defendant, jointly and severally, that if the defendant should
have a desire to quit acting, and should give notice, &c. that he
should receive, &c. as in the covenant to the intestate, and this
further covenant, which is also in the intestate's indenture shown in
the declaration, that if the defendant should give three months no-
tice of his intention to quit acting, or should die, that then he
should be free and discharged from all debts and sums of money,
contracted, borrowed, or took up, or which at any time thereafter
should be contracted, &c. and that Killigrew the intestate, and
the others, after such notice given or death, should indemnify and
save harmless the defendant from all such debts and sums of money,
bonds, contracts, and securities, contracted or entered into, by him
alone, or jointly with any other of the same company, on behalf
of the company, for any matter or thing relating to the company;
and that no person should be admitted into the said company, but
such persons as should enter into such engagements; and that the
6s. 3d. per day during their lives, and the 100 L. after their deaths,
should be in full of their shares of the clothes, scenes, and other
ornaments, &c. then the defendant shews, that he gave notice re-
gularly in 1677 (which was before the death of Lacy) and so be-
came discharged from being of the company; *et petit judicium*, &c.
The plaintiff demurred. And after several arguments at the bar
the chief justice pronounced the resolution of the court, that judg-
ment should be entred for the plaintiff.

The question is, whether this last indenture be a defeasance of
the covenant to Lacy; and they all held, that it was not. 1. Be-
cause it is a covenant made by the intestate and others with the de-
fendant, to save him harmless from all covenants, agreements, &c.
entred into on behalf of the company. And therefore it can only
be a covenant, because the intestate is joined with others, and the
covenant is joint and several, and it cannot be more than a cove-
nant as to them, for though the like deeds may have been made
with the others, yet they do not appear, and the court cannot take
notice of them. Then if this covenant of Lacy be held a defea-
sance, the other covenants will be void; and there is no need of
the covenant of the others, because the covenant of the defendant
is absolutely void. And therefore this construction would destroy
the covenants of the others.

2. By the frame of the deed it appears to be a good covenant,
because they designed to trust one another upon the agreements in
the deeds; which appears, because care is taken to save them harm-
less from all agreements upon the account of the company, and
debts;

debts; and therefore there are of necessity some things, upon which it could not operate by way of defeasance. And though this covenant be admitted to be within the agreement (which perhaps is a question), yet it is plain that they relied upon the mutual covenants.

3. This covenant in its nature is not a defeasance, because it wants the words to be a defeasance: For in case of a defeasance the words are, that the thing to be defeated shall be void: and since there are no such words here, it must be understood to be a defeasance from the nature of the thing, and not from the words; and the consequence of that would be, to leave *Lacy* without remedy; for if a covenant be defeated as to one, it will be defeated as to all; for every defeasance, when the terms upon which it is made are performed, operates as a release; and if the covenant had been, that from the death, or leaving off to act, by the defendant, the covenants made by him should be void, that would have discharged all. As if a release had been made to the defendant, all of them might have pleaded it. And where a covenant is joint and several, a release to one of the covenantors is a release to all. Like the case of a joint trespass, which is joint or several at the election of the plaintiff, a release to one trespasser is a release to all. *Hob. 66. Cock v. Jenner. Lit. sect. 376. Co. Lit. 232.* Then if a defeasance operates as a release, and discharges the *lien* as much; then if the covenant be defeated as to one, it will be defeated as to all, as much as if it had been released. *34 Hen. 8. Bro. estranger al fait 21.* Then to construe this covenant to be a defeasance, is to destroy the deed; and therefore it would be a repugnant, absurd and injurious construction, to destroy a man's assurance.

Where a covenant will amount to a release.

Aut. 420.

Objection. That a perpetual covenant, never to take advantage of a covenant, &c. is a release. He agreed it, for avoiding circuity of action. As if *A.* be bound to *B.* in a bond, &c. *B.* covenants never to sue *A.* upon this bond; this will be a bar in debt brought upon the bond, because *B.* has bound himself against all the remedy, that he might have upon the bond. But if *A.* and *B.* be jointly and severally bound to *C.* *C.* covenants never to sue *A.* this is no defeasance, because he has a remedy against *B.* but *A.* will have only covenant, &c. This case is like *43 Affis. pl. 44.* of a defeasance of a warranty, viz. that if the collateral ancestor of the disseisee release to the disseisor with warranty, and the disseisor makes a deed, reciting the release with warranty, and covenants, that though he be impleaded or ousted, yet he will not take advantage of the deed or warranty, that is a defeasance; and if the disseisor pleads the release with warranty in bar of an action brought by the disseisee, he shall be rebutted from the warranty by his own deed:

deed: but in the said case if the disseisor had covenanted only, not to bring a writ of *assize*, or not to vouch; there it would have been only a covenant, because there would have remained a remedy upon the warranty. So though the intestate covenanted not to sue *Kinaston*, yet he has a remedy against the other covenantors; therefore this is a covenant only. 2 *Ventr.* 217. *Gowden v. Draper*, there are express words, that the original payment should cease, yet that was not held to be a defeasance; and yet there could have been no mischief, because there was no other parties to the deed: if the 300 l. in the said case had been a rent, he should have been of opinion, that the second deed there would have amounted to a grant of the rent for the said time: if it had been a rent for years, not for life, it would have been a grant to the lessee for the said time, and a suspension of the rent; but there it was only a sum in gross, which nevertheless is defeasible; but held there contrary, which is a sound judgment, upon which he relied much. And for these reasons judgment was given for the plaintiff. *Ex relatione m^{ri} Jacob.*

Oliver *vers.* Hunning.

ERROR upon a judgment in C. B. in an action against two. And one of the defendants was outlawed. And exception was taken to the writ of error, because it mentioned the writ to be brought against one only. But it was held good, because the writ as to the other was determined by the outlawry. *Ex relatione m^{ri} Jacob.* Error upon a judgment in an action against two, one was outlawed.

Peirce *vers.* Paxton.

Intr. *Pasch.* 13 Will. 3. B. R. Rot. 94.

DEBT upon bond. The defendant pleaded *puis darrein continuance* in abatement, payment of part with acquittance. The plaintiff demurred. And *per Holt* chief justice this is no plea in abatement, but in bar for part. *Cro. Eliz.* 342. *May v. Middleton.* And the reason is, because that which is a bar before the action brought, is a bar after, because the time cannot make a difference. 34 *Hen.* 6. 1. 6. 7 *Edw.* 4. 15. *Stile* 212. is an obscure case, but there it is pleaded in bar of the whole, which cannot be. The case of entry into part of the land pending a real action is different from this case; because there pending that the plaintiff sues at law, he makes himself his own judge; but here he pursues his demand; and the defendant here consents, which he

Omission of a
proof in cu-
ria substance.

he does not do in the other case. There is a difference be-
tween this case and the case of a foreign attachment, which was
the case of *Mey v. Middleton*, because that is by compulsion of
law. 2. The plea was ill, because the defendant had not produced
the deed of acquittance in court. Which was held to be substance,
and ill upon a general demurrer. And *respondens* after was
awarded.

Fetter *vers.* Beale. Ante 339.

S. C. Salk. 11.
Ante 339.
Prior recovery
in trespass bars
consequential
maihem.

SIR *Bartholomew Shower* moved in this case for judgment for
the plaintiff, because this special subsequent damage is a suffi-
cient foundation for an action; and that for great reason, because
the jury could not have consideration of it in giving damages.
And he compared it to the case of a nuisance, that a man might
have an action for every new dropping of the water from the eaves
of the house. 2. There is a *maim* laid here, and therefore the
prior recovery in the action of assault cannot be a bar. Mr.
Montague of the same side said, that if *A.* breaks a sea wall, and
the owner of the land recovers damages for it in an action, and
erects a new wall, and before it is dry and settled, the sea throws it
down again, and overflows the land, &c. for this special subsequent
damage the owner may have a new action. *Holt* chief justice.
This is a new case, to which there is no parallel in the books.
Every one shall recover damages in proportion to his prejudice,
which he hath sustained; and if this matter had been given in evi-
dence, as that which in probability might have been the conse-
quence of the battery, the plaintiff would have recovered damages
for it. The injury, which is the foundation of the action, is the
battery, and the greatness or consequence of that is only in aggra-
vation of damages. In some cases the damage is the foundation of
the action, as in the action by the master for battery of his servant
per quod servitium amisit; but here the battery only is the founda-
tion of the action, and this damage, which might probably ensue,
might and ought to have been given in evidence, and must be in-
tended to have been given in evidence in the former action, and
that the jury gave damages for all the hurt that he suffered; for if
the nature of the battery was such, as probably to produce this
effect, the jury might give damages for it before it happened. As
to the case of the sea wall, the plaintiff would recover damages
enough in the first action, to rebuild it; and if he rebuilds it ill,
the fault is his own. And as to the nuisance every new dropping
is a new nuisance. As to the *maihem*, that is nothing, for a re-
covery in battery, &c. is a bar in appeal of *maihem*, 4 Co. 43. a.
because in battery the plaintiff may give a *maihem* in evidence, and
recover

recover damages for it. And *Hob* chief justice said, that the original cause was tried before him eight years ago, and the plaintiff and defendant appeared to be both in drink, and the jury did not well know which of them was in fault, and therefore they gave the less damages. The plaintiff could not obtain judgment, the court inclining strongly against him.

Barber vers. Palmer.

Intr. *Hil.* 9 *Will.* 3. B. R. Rot. 535.

DEBT upon bond of 26 *l.* dated the second of *April* 1695. s. C. 1 Salk. The defendant after a special imparlance craves oyer of the 178. bond, and condition, which was for payment of 13 *l.* 3 *s.* the The composition act is no plea in abatement, but in bar. tenth of *January* following. And then he pleads the act of the eighth of this King for composition by two thirds in number and value of the creditors; and pleads a composition accordingly, &c. in abatement of the bill. To which plea the plaintiff demurs. And it was adjudged, that this matter is matter of bar, but cannot be pleaded in abatement. And therefore judgment was given, that the defendant should answer over. And then the defendant pleads the same matter in bar. Upon which the plaintiff demurs. And the defendant joins in demurrer. And *quia curia nondum advisatur*, day is given to the parties *usque diem Veneris proxime post crastinum Trinitatis* 10 *Will.* and so continuances were entred from thence till *Monday proxime post tres septimanas sancti Michaelis*, and from thence to *Monday proxime post octabas Hilarii*. At which day the defendant pleaded a plea *puis darrein continuance*, which he intended to be a defeasance of the debt. But upon demurrer the court adjudged, that it amounted but to a covenant. And now it was argued for the defendant by Mr. *Place*, that the court nevertheless ought to consider the plea in bar; and if that was good, the plaintiff could not have judgment. *Hob.* 81. *Stoner v. Gibson*, in point. But the court gave judgment for the plaintiff, *nisi*, &c. Plea puis darrein continuance ill after plea in bar pleaded, the court cannot resort to the plea in bar. See Moor 871. Hob. 81. 12 Mod. 539, 559. Jenk. 160. holding that the pleading of the latter plea was a waiver of the former plea in bar. And the last day of this term *Raymond* urged the same case in *Hobart* for the defendant; and also that it is laid down as a rule in many books, that the court must judge upon the whole record; and therefore if it appears upon the whole record, that the plaintiff ought not to have judgment, the court cannot give it for him. *Hob.* 56. 7 *Edw.* 4. 31. *per Choke* 10 *Edw.* 4. 7. a. But notwithstanding this, the chief justice said, that without doubt it was a waiver of the former plea; and if it were not so, pleading would be infinite. And therefore the cause shewn for the defendant was disallowed. And judgment was given for the plaintiff.

Slaney *vers.* Slaney.

S. C. Cases

D. R. 524.

12 Mod.

Plea though

in bar conclu-

ding in abate-

ment.

Mo. 30. pl. 99.

IN debt upon bond the defendant pleaded outlawry in the plain-
tiff, and began it, *actio non*, and concluded in abatement.
And Mr. *Mulso* moved, to try the opinion of the court, whether
this should be taken to be a plea in abatement, or a plea in bar;
if in abatement, then it did not come in in time, otherwise if a
plea in bar. Besides, that if it should be adjudged to be a plea in
abatement, and the plaintiff should reply as to a plea in bar, it
would be a discontinuance. For which the cases of *Bisse v. Har-*
court, 3 Mod. 281. *Bonner v. Hall*, ante 338. and *Medina v.*
Stoughton, ante 593. were cited. In which last case the defen-
dant in his plea prayed judgment *de narratione*, and it was objected,
that this was a conclusion in bar; and the plaintiff demurred, and
concluded as to a plea in bar; and yet judgment was given, that
he should answer over. But to that the court said, that they gave
such judgment, because it were erroneous, the defendant could not
take the advantage of it, no more than of allowing an *essoins*, where
an *essoins* ought not to be allowed, which is for the defendant's ad-
vantage. *Adjournatur.*

Mich

Mich. Term

13 Will. 3. B. R. 1701.

Parsons *vers.* Gill.

MR. Broderick made a motion to refer the regularity of S. C. ^{1 Salk.} an execution to be examined by the master, &c. alleg- ^{50.} ing it to be irregular for this, that the writ of execu- ^{S. C. Comyns} tion bore *teste* the first day of *Hilary* term, returnable ^{117.} the *Easter* term following, and the judgment was of *Hilary* term, ^{A writ of exe-} so that the writ of execution might have been sued perhaps before ^{cution *teste* the} the judgment given. Besides, that the judgment was signed after ^{first day of} the death of the defendant, for the defendant died the first of *April*, ^{*Hilary* term,} and the judgment was signed the second of *April*, which being be- ^{judgment the} fore the *effoin* day of *Easter* term related to *Hilary* term; and ^{same term,} therefore altogether irregular. But the motion was denied, because ^{good.} (*per curiam*) the practice is always so, and well enough.

Sir Richard Leving *vers.* lady Calverley.

ERROR C. B. The error was assigned for want of an origi- ^{S. C. Cases} nal, and upon a *certiorari* sued the return was, that no ori- ^{B. R. 561.} ginal, &c. Upon which the defendant in error suggested, that ^{S. C. Comyns} there was an original of another term; and upon a *certiorari* sued ^{118.} by him, an original was returned, and an entry made thereof upon ^{Upon dimina-} the roll. And Mr. Broderick moved, that it was irregular, because ^{tion alleged,} the defendant should have given notice in writing to the plaintiff's ^{a second *cer-*} attorney, before he sued the *certiorari*. That the practice was so; ^{*tiorari*.} and in a case between *Nayden* and *Winterbottom*, *Mich.* 10 *Will.* 3. such a rule was granted. But *Holt* chief justice said, that it could be no prejudice in the writ of error. To which Mr. Broderick answered,

swered, that the writ of error was brought for this reason, and therefore he ought to have his costs, which he would lose, if the judgment should be affirmed. But to that the chief justice answered, that if the lord keeper had been of opinion, that the plaintiff ought to have had his costs, he would not have granted the liberty of filing an original, before costs were paid by the defendant. And the motion was denied.

Nailor's case.

S. C. Cases
B. R. 562.
Holt 494.
12 Mod.
Habeas corpus
granted, to
bring a man
out of the cu-
stody of the
sheriff, being
there upon a
ne exeat regno.

NAILOR an attorney of the Common Pleas was arrested in London upon a plaint levied in one of the Sheriffs courts of London, and was carried to the counter. A writ of *ne exeat regno* issued out of Chancery against him, and was delivered to the sheriff whilst he was there. Upon which Nailor made application to Mr. justice Turton at his chambers, and afterwards to my lord chief justice Holt, to have a *habeas corpus* to remove himself into the Marshalsea, actions being entred against him in the King's Bench. And an order was made, that it should be moved in B. R. And now Mr. Broderick moved, that the *habeas corpus* ought not to be granted in this case. 1. Because the writ of *ne exeat regno* commands the sheriff to take security, and to transmit it into Chancery; which he cannot do, if this *habeas corpus* shall issue out of this court. 2. They in Chancery only know what security is sufficient, being only constant upon what ground this writ was granted. 3. They in Chancery can only grant a *supersedeas*. *Sed curia contra*, that the *habeas corpus* ought to be granted; that the King's Bench may receive and judge of the security taken, and that he ought to remain there, and that they may then grant a *supersedeas*. *Sed adjournatur*.

Byne vers. Dodderidge.

S. C. Lilly's
Entr. 311.
Modus to pay
2 s. in the
pound out of
the rents re-
served, is no
modus.
Ro. Abr. 643.
T. p. 1.

MR. Chesbire moved against a rule for setting this aside, being granted to discharge another rule before made, by which a prohibition was granted to the Spiritual Court, to stay a suit there for tithes, upon suggestion of a *modus*; and this last rule was made upon allegation, that the plaintiff had had a prohibition granted before, and that he had declared upon it, and that issue had been joined upon it, and a verdict found in it against the plaintiff. And that which Mr. Chesbire now urged against this last rule was, that this *modus*, upon which the rule was made for the granting of a prohibition, varies from the *modus*, upon which the prohibition had been granted before, and the verdict had, &c. And therefore that this

this case was not within 50 *Edw. 3. cap. 4.* For the present *modus* suggested is, that they have used to pay 2 s. in the pound of the rent reserved; whereas the former *modus* was, that they used, &c. to pay 2 s. in the pound of the profits received. And he cited *Hob. 192.* Against this Mr. *Broderick* said, that this *modus* was not good; for as it is laid in the suggestion, if the plaintiff keeps the lands in his own hands, he shall pay nothing to the parson; for the *modus* is laid to be paid out of the rent reserved. 2. He may let a lease at a smaller rent upon payment of a fine. And he cited 1 *Roll. Rep. 378.* 2 *Ventr. 47.* But (*per Chesbyre*) that would be a fraud. *Curia contra.* It would not be a fraud. And *per Holt* chief justice, 1. This cannot be a *modus*, it amounting to as much as the tithes in kind; but it may be a composition. 2. A custom cannot be applied to rents reserved from time to time upon frequent new reservations. And the rule for discharging of the rule granted for the prohibition was made absolute.

Bals vers. Firmen.

IN debt upon a bond made in this manner. *Noverint universi* Variance.
per praesentes me Firmen de Perth Amboy in provincia
de West Jersey teneri et firmiter obligari to the plaintiff in 80 l. *legalis monetae praedictae, &c.* The plaintiff demanded 80 l. of the money of England. And upon *non est factum* pleaded, at the trial before *Holt* chief justice at *Guildhall, Pasch. 13 Will. 3.* the plaintiff was nonsuit; the chief justice holding, that this bond bound the defendant in the money of *West Jersey*, not of *England*; the condition of the bond being also for payment of 40 l. of the said province. And now the plaintiff brought a new action upon this bond in the *detinet* as of foreign coin *ad valorem* of so much of the money of *England*. And this term serjeant *Hall* moved, that the plaintiff might not proceed, before he had paid the costs of the former nonsuit. Which was opposed by *Raymond* for the plaintiff, and denied by the court. Because the merits did not come in question in the trial, upon which he was nonsuit, but he was nonsuit only upon the variance. And the said rule is grantable generally only in ejectment.

A plaintiff nonsuit upon a variance brings a new action, the King's Bench will not stay the second action until he has paid the costs of the first.

2 Barnes 107.
 1 Barnes 99.
 100.

Rowland et al. *vers.* Hockenulle et al.

In the Exchequer.

Prohibition
out of the Ex-
chequer to the
Chancery of
Chester.

ROWLAND and others bring an ejectment in *Chester* against the defendants. Upon which the defendants exhibited their bill in the court of Exchequer of *Chester*, which is the Chancery there, against the plaintiffs. And to procure an injunction, they suggest in their bill, that one of the defendants in the bill, plaintiffs in the ejectment, dwells out of the county palatine, and therefore they pray, that service of the injunction upon the attorney of the defendants in the bill may be good service. And an order was made accordingly. Upon which Mr. *Chestyre*, upon producing a copy of the bill and order, moved in the Exchequer for a prohibition. And a rule was made that they should shew cause why, &c. And now Mr. *Ward* shewed cause. *Sed non allocatur*, because, 1. They cannot serve the process of their Exchequer upon a man out of the jurisdiction. 2. They cannot make a supplemental order, to supply this defect of the jurisdiction. 3. They cannot proceed, where part is out of their jurisdiction. And the rule for a prohibition was made absolute.

Holdin *vers.* Sutton.

S. C. Cafes
B. R. 565.
12 Mod.
Debt by exe-
cutor for
escape in the
time of the
testator in the
*debet et deti-
net* ill.

DE B T was brought by the plaintiff upon an escape done by the defendant marshal of this court in the time of the testator, and it was brought in the *debet et detinet*. Upon *nil debet* pleaded verdict for the plaintiff. And now serjeant *Hall* moved in arrest of judgment, that this action cannot be maintained in the *debet* and *detinet*, but ought to have been brought in the *detinet* only. And it was admitted, that after demurrer it would have been ill. But at another day Mr. *Peere Williams* and Mr. *Boult* for the plaintiff argued, that this was aided after verdict by 16 & 17 Car. 2. cap. 8. And for that they cited 1 Sid. 342. *Comber v. Watton*, debt against the heir brought in the *detinet* only upon a bond of the ancestor, in which he bound himself and his heirs, good after verdict, though it ought to have been in the *debet* and *detinet*; and 1 Sid. 379. *Fruen v. Porter*. But the court seemed to the contrary, because it would alter the nature of the action, and therefore the right was not tried. And judgment stayed, *nisi*, &c.

I

Rex

Rex *vers.* Symonds.

SYMONDS was brought into the King's Bench upon a *habeas corpus* directed to the keeper of the *New prison*. And by the return thereof it appeared, that she was committed by Mr. Perry a justice of peace to *New prison*, because she was a lewd, idle and disorderly person, for that she was found in a reputed bawdy-house. And Mr. Eyre moved, that she might be discharged, because the commitment was illegal; 1. Because the bare being found in a bawdy-house was no cause of commitment. 2. Because the justices of peace could not commit to *New prison*. And *per Holt* chief justice, the barely being in a suspected house at a time not unseasonable, shall never be cause of commitment; but the justices may commit a lewd, idle, and disorderly person; therefore a general commitment, that she was an idle and disorderly person, had been good. But here the justice of peace assigns that for cause of idleness and disorderliness which is no cause, *viz.* the being found in a house of ill repute; and therefore this commitment seems ill. But then upon reading several *affidavits* concerning the debauchery and obscene actions, &c. of the defendant, the court refused to discharge her without bail found. And therefore because she could not find bail, she was committed to the *Marshalsea*.

Justices may commit an idle and disorderly person to prison. *Vide Stat. 17 Geo. 2. c. 3. 2 Burn's Just. 486. Ante 66.*

'The inhabitants of the parish of St. Andrew's Undershaft in London *vers.* Jacob Mendez de Breta.

THE defendant being a Jew had an only daughter, who was converted from *Judaism*, and embraced *Christianity*. Whereupon the defendant turned her out of his doors, and refused to allow her any maintenance. Upon which on complaint made to the justices at the general quarter-sessions, they reciting that she was the daughter of the defendant, and that he was a man able to maintain her, made an order that the defendant (being very rich) should allow her 20 s. *per* month for her maintenance, under the penalty of 12 l. And this order they founded upon the 43 *Eliz.* And now Mr. Dee, Mr. Cowper and Sir Bartholomew Shower made a motion to quash this order, because the justices have not any jurisdiction to make such an order, it not being within the said statute, because it was not alleged that she was poor, or likely to become chargeable to the parish. And the order was quashed.

Justices make an order, that a father shall allow 20 s. a month to his daughter, ill Shaw's Parish Law, cap. 50. sect. 8. Comb. 321, 405. 2 Bull. 345, 347. Sty. 283.

Chauncey

Chauncey *vers.* Winde et al.

Intr. Trin. 13 Will. 3. B. R. Rot. 82.

S. C. 2 Salk.
628.*De son tort de-
mesne absque
tali causa,*
where plead-
able.

12 Mod. 580.

See Comyns

582, 583.

pl. 254.

2 Lutw. 1347,
1350.Thorne v.
Birch.

TRespass for taking of the plaintiff's salt. The defendant justified under a warrant from the commissioners of the duty upon salt, by virtue of an act of parliament lately made, which prohibits the lading of salt upon any ship, before it has been weighed by the officers of the duty, under penalty, &c. The plaintiff replied, that the defendant seized it of his own wrong, *absque tali causa*, generally. The defendant demurred. And Mr. *Ward* for the defendant argued, that the replication was ill, because the defendant justified as servant, and therefore the special matter ought to be traversed; and such general traverse is not good. 8 Co. 67. *Crogate's case*; 1 Roll. Rep. 47. and held accordingly Hill. 6 Will. 3. Mar. between *Thorne* and *Birch*, intr. Trin. 6. Rot. 819. 2 Keb. 266. *Lambert v. Kellum* accord. Cro. Eliz. 539. 2. The defendant justifies by authority given by the law, and therefore such general traverse is not good. 2 Roll. Abr. 694. And this is proved by the statutes of the commissioners of sewers, because there liberty is given, where justification is made under the said act, to make such replication, *de son tort demesne absque tali causa*; which implies, that without such provision made by the act, it could not have been pleaded so generally. Against this it was argued by Mr. *Eyre* for the plaintiff, that the replication was good. He agreed, that where a justification is made under matter of record, a special answer ought to be given to it; as where a justification is made under a *capias*, *fieri facias*, &c. and a replication *de son tort demesne absque tali causa* is not good. But the said rule is not general, but liable to some distinctions; as where the matter of record is but inducement to the action, there such special answer is not requisite. 2 Leon. 102. And in this case this statute is but inducement to the justification, for the defendant had no need to have pleaded it, it being a general statute; but it would have been a good plea, to have said, that the salt was carried on board of the ship after the ninth of May, &c. unweighed by the officers; and therefore here all the substantial part of the plea is matter of fact, and the record is not involved in the traverse, which is the reason that such traverse here is good; *contra* where the record is involved in the traverse with the matter of fact. Besides, that this rule ought to be understood, where the matter of record may be traversed; but a general act of parliament cannot be traversed, because it is matter of law, and matter of law cannot be traversed. Objection: That here the defendant justifies under an authority derived from the

the law, and therefore such general traverse cannot be good. Answer: The third resolution in *Crogate's* case contradicts the first. 16 Hen. 7. 2. That such traverse is good. And as to the case in *Rolle's abridgment* cited by Mr. *Ward* (by him) it is not law, because such general traverse is aided by verdict. *Raym.* 50. *Collins v. Walker*. And in *Co. entr.* 643. in trespass and assault, the defendant justified under the statute *de malefactoribus in parvis*, the plaintiff replies as here, and held good. To which Mr. *Ward* for the defendant replied, that in this case the statute is not inducement, but the point of the justification, and therefore such traverse is ill. And he cited *Bro. de son tort demesne* 21. And (by him) the third resolution in *Crogate's* case does not contradict the first, because the proceedings in a court baron are but matter of fact, not of law. And *per Holt* chief justice, the replication seems good, because the statute is a general act, and had no need to be pleaded. But then exception was taken to the plea, that it does not appear what sort of fact this was; and perhaps it was bay fact, which is not within the act; and therefore the plea is ill, because it does not shew, that the fact was such as the act extended to. And for this reason judgment was given for the plaintiff, *nisi*, &c.

Warner *vers.* Green.

CASE for continuance of a nuisance. The defendant pleaded, that the plaintiff was excommunicate, and did not shew the certificate, nor for what cause the excommunication was; and concludes his plea with a prayer, that the parol *remaneat sine die*, without saying *quousque*. The defendant demurs. And for these reasons *respondes ouster* was awarded.

S. C. Cases
B. R. 580.
12 Mod.
9 Rep. 41.
8 Rep. 62, 67.
Excommuni-
cation pleaded.

Pink *vers.* Rudge.

Intr. Trin. 13 Will. 3. Rot. 43.

CASE upon several promises. The defendant pleaded the statute of limitations. The plaintiff replied a *clausum fregit* sued, returnable in C. B. before the six years, *ea intentione* to declare in this action upon the case; and did not shew, that the writ was continued. And upon demurrer judgment for the defendant.

Ante 434.
Statute of limitations pleaded, *clausum fregit* replied.

Roberts *vers.* Price et al', manucaptors Brook.

12 Mod. 215.
2 Salk. 466.
The writ
pleaded was
returnable
coram domino
rege apud
Westmonaste-
rium, the writ
produced was
ubicunque.
2 Barnes 219,
220.

IN *scire facias* upon a recognisance of bail, the defendant pleaded, that no *capias* issued against the principal. The plaintiff replied, and shewed a *capias*, returnable *coram domino rege apud Westmonasterium crastino ascensionis*. The defendant rejoined *nul tiel record*. And upon producing of the record it agreed with the record pleaded *in omnibus*, only in the words *apud Westmonasterium*, instead of which there was the word *ubicunque*. And held no failure of the record. *Ex motione m'ri Broderick*, who cited 16 *Affs.* *pl. 9. Hob. 55. 36 Hen. 6. 2.*

Rex *vers.* Marks.

Indictment for
taking 10*l.*
in pecuniis nu-
meratis good.

MR. Eyre moved for the quashing of an indictment for the unlawful taking *vi et armis* of ten pounds *in pecuniis numeratis* of J. S. 1. Because an action lies. 2. Because it ought to have been shewn, how many ounces these ten pounds contained, and therefore it was uncertain. *Sed non allocatur*; because the court knows well enough how much money makes a pound, and it is certain enough.

Hopkins *vers.* Squibb.

Privilege in
scaccario for
the clerk of
the *nichils*.
1 Chan. Rep.
69, 70.
Bro. Privil.
p. 26.
3 Leon. 223.
Hard. 365.
2 Show. 299.

IN an action upon the case, the defendant pleaded, that by custom, time whereof, &c. *residentes*, &c. (instead of *residentes*) *in scaccario domini regis, et negotiis ipsius domini regis ibidem jugiter intendentes, ac eorum ministri, &c. alibi non traherentur in placita quam in scaccario praedicto quamdiu idem scaccarium apertum foret*; and then he shews, that he at the time of the filing of the bill was, and now is, clerk of the *nichils*, &c. and that he attended there *personaliter*, &c. and shews the writ, &c. The plaintiff demurs specially. And Mr. Southouse urged, that the plea was ill. 1. Because there was not any such word as *residentes*, but it ought to be *residentes*. *Rast. entr. 473.* 2. The custom extends only to persons *jugiter intendentes*, &c. and the averment is of an attendance personally, which is not within the custom. *Sed non allocatur*. For *per Holt* chief justice, it is enough to say, that the defendant was clerk of the *nichils in scaccario*, and his residence necessary there, and then to shew the writ; and the other is but recital, and not necessary. And therefore judgment was given for the defendant, that the plea should be allowed.

Ante 337.

Pollard *vers.* Gerard.

A Motion was made for a prohibition to be directed to the court S. C. 1 Salk. 333. p. 10. of the archdeacon of *Middlesex*, to stay a suit there by *Gerard* against the plaintiff for fees, viz. 4 s. due to him as register *Ibid.* p. 11. from *Pollard*, being sworn before him churchwarden of the church Register cannot sue for fees in the spiritual court. of, &c. upon suggestion, that the office of register is a temporal 10 Mod. 264. office, and all profits and fees due to it suable at common law. And a rule was made, that they should shew cause, why a prohibition should not be granted. 268. And now Mr. *Broderick* shewed 1 Mod. 167. cause against it. And he agreed, that prohibitions had been granted, 5 Mod. 242. to stay suits there for fees due to the proctors; but in this case the spiritual court may make a better judgment, whether the fees in demand are due and reasonable. Besides, that they are so small, that it would not be worth while to bring an action at common law for them; and in such case this court will not drive the party to the tedious and expensive remedy of an action. In this court the door-keepers claim fees by custom, and fees are due to the marshal, cryer, &c. at the assises; and in such cases if the parties, who ought to pay the fees, refuse to do it, this court, or the judge of assise respectively, exert their authority, and commit persons refusing to pay their fees, and do not drive the party grieved to their action; and (by him) this is the constant practice. But *per Holt* chief justice, He knew of no such practice; and (by him) he could not commit a man, for not paying the said fees. If there is right, there is remedy; and *indebitatus assumpsit* will lie, if the fee is certain; if uncertain, *quantum meruit*. It was held 15 Car. 2. in *scaccario*, *Hardr.* that a register cannot sue for his fees in the spiritual court. And therefore a prohibition shall be granted, and if the parties will, the plaintiff shall declare upon it, to the end that the matter may be determined more judicially. A judge cannot commit a man refusing to pay the fees.

Watson *vers.* Huddleston.

Intr. *Trin.* 13 *Will.* 3. Rot. 332.

ERROR of a judgment given in the court of *Carlisle* in debt upon two bonds. The plaintiff declared there upon a bond dated the tenth of *February 6 Will. & Mar. annoque domini 1693*. Judgment by default. And upon error brought, and the general errors assigned, Mr. *Ward* for the plaintiff in error argued, that there was no such day as the tenth of *February 6 Will. & Mar.* because the queen died before the tenth of *February* in the sixth of *her*

Date of a bond, part possible, part not. *Ante 681.* The year of the K. and Q. right, but the year of our Lord right; the first is only surplufage.

Brownl. 234. 2 Ro. Rep. 135. Cro. Jac. 549, 550. Palm. 74, 75.

her reign, viz. the twenty-seventh of December. And therefore the date being impossible, the plaintiff should have declared upon the delivery. *Co. Lit.* 46. and other books. And of that opinion Holt chief justice seemed to be. But *Priory* and *Gould* held, that the *anno domini* 1693 was sufficient, and that the rest should be rejected. Another error was assigned, that this action was brought upon two bonds of 16*l.* each, and the plaintiff has avowed, that the 32*l.* were not paid, but does not say, that any part thereof was not paid; now it may be, that the plaintiff was satisfied for one intire bond, viz. 16*l.* Indeed it is not necessary to say, that any part of one bond is not paid, where the demand is only upon one intire bond; because if the whole is not paid, the debt continues. But here there are two bonds, and therefore there is a difference, because one of them perhaps is intirely satisfied. But all the court held, that this was well enough, and did not regard any difference between one bond or two bonds as to this matter. But the writ of error was quashed for an exception taken to it by Mr. *Ward*. For the writ was directed *majori aldermannis ballivis et civibus civitatis Carlioli*, to remove the record of a judgment given in *quadam loquela* before them, &c. and the record removed was of a plaint levied at the court held before the deputy mayor and bailiffs. And therefore this was held a material variance, *Ward* council with the plaintiff in error. *Raymond* with the defendant.

See 2 Ventr.
106. T. Jones
24. 219.
21 Ed. 4. 28.
Debt upon
two bonds for
32*l.* aver-
ment that the
32*l.* were not
paid.

See 1 Roll.
Abr. 796. pl.
25.

Variance.

Spencely *vers.* Sutton marshal B. R.

No committitur
entred in
the marshal's
book shall not
be ground for
a new trial.
See Sid. 220.

EScape against the defendant for the escape of *W.* &c. Upon not guilty pleaded, verdict for the plaintiff. The evidence upon the trial was, that *W.* was in the prison of the *Marsbalsea*, and that a *committitur* was entred upon the roll. And it was objected by the defendant's council, that though such *committitur* entred upon the roll is all the record made of such commitment by the court, yet by the practice of the court the plaintiff who recovers, &c. ought to make such entry in the marshal's book kept for that purpose, and that the marshal keeps a clerk to make such entries; and the intent of it is, that the marshal shall have notice of such commitments, and that without that he shall not be chargeable in escapes. For though a *committitur* be entred upon the roll, yet perhaps the marshal has no notice of it; and it is unreasonable, that he should be liable for an escape, without notice that the man was committed in execution. The like practice in case of a *reddidit se* in discharge of bail; for though the *reddidit se* is entred in parchment, and filed with the proper officer; yet such entry is made also in the marshal's book, to the end that he may have

have notice of it. Now in this case no such entry was made in the marshal's book, and therefore he is not chargeable in escape. But *Holt* chief justice, before whom this cause was tried at *Guildhall*, held the entry of the *committitur* upon the roll, &c. as aforesaid, to be good evidence. And a verdict was given for the plaintiff. But *Holt* gave leave to the defendant, to move it in *B. R.* And afterwards he moved for the reason aforesaid to set aside the verdict. But it was denied by the whole court. For (by them) trials shall not be set aside, because the defendant might have prevented it before the trial, as in this case he might have moved the court. And it seems to be a trick, to keep it in secret, to set aside a verdict, if it were not according to the defendant's desire. But if the defendant had intended to act rightly, he should have given notice of this irregularity to the plaintiff; but it will not set aside the verdict, when the plaintiff has proved all his declaration. And the motion in *B. R.* was denied, and the plaintiff had his judgment.

Rex *vers.* Worfenham et al.

AN information was preferred against the defendants being custom-house officers, for forging of a bond supposed to be given by a merchant to the King for his customs. And motion was made on behalf of the prosecutor, to have the custom-house books in which the entries were made, &c. brought into court, to convict the defendants. But the motion was denied, because the said books are a private concern, in which the prosecutor has no interest; and therefore it would be in effect, to compel the defendants, to produce evidence against themselves. And the court never makes such rules, but only of records, or deeds of a publick nature.

Motion that custom-house books shall be produced, denied. *Ante* 252, 253.

Walgrave *vers.* Taylor.

THE motion was to have judgment set aside in trespass after judgment by default and a writ of inquiry executed; because the effoin day of *Easter* term was *Sunday*, which not being *dies juridicus*, it was held on the *Monday*, and the declaration in this case was delivered on the *Sunday*, which could not be by the 29 *Car. 2. cap. 7.* which restrains process in law from being executed upon *Sundays*. 2. If this should be allowed, the plaintiff would gain a term by it, where the said day ought to be the effoin day of *Easter* term, and therefore it ought to be but a declaration of the said term; but the declaration being delivered before the

12 Mod. 606. Declaration delivered upon a *Sunday*. Comb. 21. Vent. 7. Sid. 406.

Allefon v.
Brookbank.
Carth. 504.
Citation.

effoin day, which was held on *Monday*, it will be a declaration of *Hilary* term. But against this it was urged by Mr. *Mead* for the plaintiff, that the delivery of a declaration was not service of process. And that *Hil. 11 W. 2. B. R.* between *Allefon* and *Brookbank* it had been held, that the service of a citation upon a *Sunday* was good, and not restrained by the act of *Charles 2.* Which was agreed by *Holt* chief justice, but he seemed to incline, that the delivery of a declaration upon the *Sunday* was ill; because the said act intended to restrain all sorts of legal proceedings. But *Powys* and *Gould* justices *contra*, because such delivery was but *quasi* a notice; and as a letter, and not a process. But it appearing to the court, that the defendant had appeared, and that a writ of inquiry had been executed, they would not intermeddle; and said that that had made all good. And the judgment stood.

Rex *vers.* Fitzgerald.

S. C. Cases
B. R. 562.

Time to plead
in information.

Fitzgerald was bound in a recognizance, to appear the first day of this term, and an information was preferred against him for a libel before the effoin day of the term. And upon motion by the attorney general that he might plead in this term, it was ruled by the advice of the clerks, that he ought to imparle until next term. The same law if he comes in upon attachment. But upon a *cepi* returned to a *capias* he shall plead *instantanter*.

Hilary

Hilary Term

13 Will. 3. B. R. 1701.

Staples vers. Heydon.

Intr. Mich. 13 Will. 3. B. R. Rot. 370.

TRESPASS. The defendant justified by a term for S. C. 1 Salk. years, beginning it with a general *possessionatus*, &c. 173, 216. The plaintiff replied, and an immaterial issue was joined. Repleader cannot be granted after issue joined, before verdict: 2 Salk. 579. 6 Mod. 1. And now serjeant *Darnall* moved for a repleader. And he was opposed by Mr. *Ward*, because a repleader cannot be granted before verdict. And for that he cited 3 *Keb.* 664. *Cox v. Millish* in point. But *Holt* chief justice seemed to be of a contrary opinion. And a day was given to hear council of both sides. And afterwards at another day upon consideration, &c. of this, *Holt* chief justice delivered the opinion of the court to be, that now a repleader ought not to be granted before trial; because now by the statute of 16 & 17 *Car.* 2. *cap.* 8. of *jeofails* many defects are aided by verdict; and therefore granting of a repleader may be prejudicial to the plaintiff. And a repleader was denied. See *post.* *Trin.* 2 *Ann.* B. R. 922. S. C.

Leighton vers. Theed.

UPON a motion for a new trial, it was said by *Holt* chief S. C. 2 Salk. justice, that if there be a tenant at will rendering rent quarterly; the lessor may determine his will when he pleases; but 413. S. C. 3 Salk. 222. then he will lose all the rent, that would be due for the quarter, 4 Mod. 79. in which he determines his will. So the lessee at will may determine his will when he pleases, but then he shall pay the rent for mined. *Post.* 1008. Will determine. all

all the quarter, in which he determines his will. But if *A.* makes a lease to *B.* for a year, and so from year to year, *quandiu ambabus partibus placuerit*; *A.* may determine his will at the end of any year, but if any new year be begun, it cannot be determined before the end of the year. He ruled the same point accordingly *Lely v. Green.* at a trial upon evidence, the summer assises at *Lincoln* 1699, between *Lely* and *Green*.

Ingram *vers.* Foote.

Intr. *Pasch.* 13 Will. 3. B. R. Rot. 136.

S. C. Cases
B. R. 611.
12 Mod.
12 Mod. 649.
Act of pardon.

THE plaintiff brought an action of debt upon a bond of 50*l.* against the defendant as executrix to, &c. The defendant pleaded, that the testator was also bound to *Mary Mead* in a bond of, &c. and that she in *Hilary* term 12 Will. 3. exhibited her bill in this court against the defendant, and obtained judgment against her; and also that her testator bound himself in a recognisance to the King at the assises in *Essex* held before *Treby* chief justice of the Common Pleas, with condition that *J. Hessop* should appear at the next assises, &c. and then she shews, that *Hessop* did not appear, whereby the recognisance became forfeited to the King; which recognisance appears by the plea to be acknowledged before the last act of general pardon, but the defendant avers that it was not pardoned; and the defendant farther says, that she *tempore exhibitionis billae praedictae Mariae praedictae plene administravit*, &c. *et non habet* goods above enough to satisfy the said judgment and recognisance. The plaintiff demurs. And exception was taken to this plea. 1. That it appears that this recognisance was before the general act of pardon, and therefore pardoned; and the general averment, that it was not pardoned was not enough. But it was argued for the defendant, that this act of pardon should have been replied by the plaintiff; and the plaintiff ought to have averred, that this recognisance was not excepted in any of the exceptions of the act. For, 1. The court is not obliged to take notice of an act of pardon, unless it be commanded in the act itself, that every person shall take notice of it. But this act of pardon has nothing in it concerning notice to be taken of it by the court, &c. unless concerning process in some particular cases there mentioned, or upon a plea of the general issue. 2. It is a rule in law, that he who will take advantage of an act, ought to shew himself not to be within the exception; now here the plaintiff takes advantage of the act, and therefore of his part he ought to shew, that this recognisance was not excepted out of the benefit of the act. 3. *Inst.* 234. As to the objection, that the defendant ought to aver, that this

Cro. Car. 32,
449.
Moor 770.

this recognisance was not within the said act. Answer. The statute does not alter the method of pleading; as in cases of leases made by deans and chapters, &c. one has no need to aver, that the rent reserved was the ancient rent; but if it was not the ancient rent, that ought to be shewn of the other side. And there will be the same reason, for the defendant to aver, that this recognisance was not within the statutes of gaming, or usury. But if the plaintiff had replied the act, &c. then the court would have taken notice of it, and the averment might have been according to the old rules of law in the said case of pardon, which is a particular case. Against which it was argued for the plaintiff by Mr. Broderick. And he admitted, that he who would take advantage of a pardon in a plea, ought to aver, that he is not excluded from the benefit of it by any exception contained in it. And that does not drive him to a difficulty, because making his defense by the pardon, he will easily take notice of the exceptions. But (by him) there is a difference between persons and offenses in such case; because as to persons, without such averment the court will not take notice, whether he be the same person pardoned, or excepted, or not; but otherwise of offenses. *Noy* 99. *Moor* 619. *Popb.* 93. *Moor* 303. 2. The court will take notice of the said act, because it may be given in evidence upon the general issue.

But *per Holt* chief justice, this court is not obliged to take notice of an act of pardon, unless the act compel this court to take notice of it (for an act of pardon is not a general act) which this act does not compel us to do. And it is no consequence, that because a man may give it in evidence upon the general issue pleaded, that therefore this court shall take notice of it in collateral cases. Now in a *scire facias* upon this recognisance the defendant ought to have pleaded this act of pardon, otherwise this court could not have taken notice of it. And *Holt* said, he was not satisfied with the cases, where it is held, that a man pleading an act of pardon, ought to aver, that he is not within the exceptions; but the said matter ought to be replied by the plaintiff, or the attorney general, as the case happens to be. And it is so in all cases of private acts of pardon whatsoever, and the cases to the contrary are not founded upon solid reason. Then Mr. Broderick took another exception to the plea, *viz.* that the declaration was of *Mich.* 12 Will. 3. and that the bill of *Mary Mead* was of *Hil.* 12 Will. 3. which was afterwards; and that the defendant pleaded, that she had fully administered at the time of the exhibiting of the bill of *Mary Mead*; so that perhaps she had not fully administered at the time of this action brought. But to that it was answered, that it was, *tempore exhibitionis billae praedietae Mariae praedietae*; and therefore if it had been only *billae praedietae*, it had been good, because it would have referred to the bill of the plaintiff; and therefore *Mariae praedietae*

Notice of an
act of pardon.

Pleading.
Plowd. C.
410.
Sid. 24.

praedictae shall be rejected as surplusage. *Sed curia contra.* For though this action was brought by bill, yet no bill is mentioned in the record but the bill of *Mary Mead*, and therefore it ought to refer to that. And therefore judgment was given for the plaintiff.

Clifton *vers.* Wells.

S. C. Cases
B. R. 633.
12 Mod.

Thou art a
pocky whore,
and carriest
the pox along
with you.

1 Roll. Abr.
67. (Y. a.)
pl. 20.

Cro. El. 857,
878.

2 Brownl.
272, 276.

CASE for these words, "Thou art a pocky whore, and carriest the pox (*innuendo* the *French* pox) along with you." Upon not guilty pleaded, verdict for the plaintiff. And last *Michaelmas* term serjeant *Hall* moved in arrest of judgment, that these words are not actionable, because they shall be understood only of the small pox. And stayed until, &c. And now this term, upon cause shewn by Mr. *Chesbyre*, that the coupling of these words, pocky with whore, demonstrates, that the defendant meant the *French* pox; and therefore they are actionable. Like the case where these words were held actionable, "You have the pox, and got it of a yellow haired wench in *Moorfields*." And all the court were of the same opinion, and judgment was given for the plaintiff.

Rex *vers.* burgum Andover.

S. C. Cases
B. R. 332.
Removal at
discretion of a
common-
council-man.

A *Mandamus* was granted to the defendants, commanding them to restore *J. S.* to the office of a common-council-man. They return, that by their charter of incorporation they may remove the common-council-men *per discretiones suas toties quoties et quandocunque illis placuerit*, &c. and that they removed *J. S.* by their discretions, &c. And Mr. *Mountague* for the King urged, that they ought to have shewn some reason, why they removed *J. S.* But afterwards upon consideration it was held a good return without shewing any reason, having power to do it according to their discretions.

Rex *vers.* Morgan et al'.

Indictment
for riot.

AN indictment found against the defendants for a riot was removed in *B. R.* and upon not guilty pleaded, was tried at the assises and verdict for the King. And now motion was made in arrest of judgment, and many exceptions were taken and overruled. But one, upon which the defendant principally relied, was, that there was an omission of *juratorum et oneratorum* in the caption.

caption. To which Mr. *Braderick* answered, that there is a great difference between a record made for *nisi prius*, which is always made briefly, and an indictment removed with an intent to be quashed; that the words *super sacramentum suum* supply the omission of *juratorum et oneratorum*. *T. Jones* 180. 2 *Keb.* 59. *Rex v. Ambler*. And afterwards this term *Holt* said, that the whole court was of opinion, that it was good without saying *juratorum et oneratorum*.

Johnson *vers.* Bewick.

A Rule was made for a prohibition, to be granted *nisi*, &c. to the consistory court of the bishop of *Winton*, to stay a suit against the plaintiff by the defendant, for having said to the defendant, "Thou art a whore," and for having said to the defendant's husband, "You have married an old whore, and therefore have no children;" upon suggestion of the custom of *London* to cart whores, and that these words were spoken in *London*. And now *Raymond* shewed cause against this rule, why a prohibition ought not to be granted. 1. That this custom of *London* was obsolete, and never put in practice. 2. That it appeared here upon the face of the suggestion, that as well the plaintiff as the defendant lived out of the jurisdiction of *London*, viz. at *Bewick* in *Middlesex*, and *Johnson* in the parish of *St. Olaves Southwark*. And therefore it would be hard to deprive the defendant of punishing the plaintiff, for having spoken these malicious and defamatory words, in a court where she may proceed, to drive her to another court where she cannot proceed, the plaintiff living out of the jurisdiction of the court. And of that opinion was the whole court. And *Holt* chief justice said, that if in such case a prohibition were granted, it would give licence to all the market women, when they were in *London*, to defame their neighbours without fear of punishment. And the rule was discharged. Afterwards the same motion was made in the Exchequer by Mr. *Nelson* for a prohibition, and upon a rule made there to shew cause why a prohibition should not be granted; upon Mr. *Raymond*'s motion it was discharged, *Pasch.* 1 *Ann. reginae*.

If *A.* calls *B.* whore in *London*, where *A.* and *B.* inhabit out of *London*, and *B.* libels against *A.* for these words in the Spiritual court, no prohibition shall be granted upon suggestion of the custom to cart whores in *London*.
Ante 103.

Rex *vers.* Cross et ux'.

AN indictment was found against the defendants for having received stolen goods, knowing them to have been stole. Upon not guilty pleaded the defendant *Cross* was found not guilty, and his wife was found guilty. And now it was moved in arrest of judgment,

S. C. Cases
B. R. 634.
12 Mod.
Trespass is made felony, after that a man may not be indicted for it as for trespass.

3 & 4 Will. &
Mar. cap. 9.
sect. 5.

ment, that this fact, whereof the defendants are indicted, amounts to felony by the late act of parliament, viz. accessory after the fact, and therefore it is not indictable as a misdemeanor, as in this case it is: for if it were so, then a man might be twice punished for the same offense; for conviction upon an indictment for a misdemeanor cannot be a bar in an indictment for life. And this was urged strongly by Sir *Bartolomew Shower*. Against which it was argued for the King by Mr. *Mountague* and Mr. *Lechmere*, that if the law were according to what *Shower* said, then the late act, instead of discouraging the receipt of stolen goods, would encourage it. For generally speaking, the felons themselves are unknown (who stole the goods) and therefore no proceeding can be against them, and consequently no proceeding can be against the receiver, for the accessory cannot be tried before the principal.

2. This was not felony at common law, because it is not said, that he knew the person, &c. to be a felon. 9 *Hen. 4.* 1. But if it be now a felony, the King has liberty to proceed against the defendants, either as for a misdemeanor, or for felony. 18 *Edw. 4.* 10. pl. 28. An indictment held good for trespass, where it was ill for felony. 4 *Edw. 4.* 14. 3 *Keb.* 818. *Rex v. Thompson. Et adjournatur.* And afterwards *Holt* chief justice pronounced the opinion of the court to be, that judgment ought to be arrested. Because now this fact being made felony by the statute, is not indictable as a trespass. And *per Holt* chief justice, it would have been the same at common law, because this fact would have been good evidence of having been accessory to the felony after the fact at common law. And judgment was arrested.

Rex *vers.* Roberts.

Buttons.

10 Will. 3.
cap. 2.

AN information was exhibited against the defendant for having made wooden buttons, contrary to the late act of parliament. Upon not guilty pleaded, it was tried before *Gould* justice at *Lincoln*, being judge of assize; and a special verdict was found there, viz. that all the button was of wood, but there was in it a shank of wire. And after argument by Mr. serjeant *Neve* for the King, and Mr. serjeant *Munday* for the defendant, judgment was given for the King, viz. that this was a button of wood, notwithstanding the shank, which is no essential part of buttons; for buttons of filk and hair have no shanks.

Adjudged accordingly *Pasch. 5 Ann. B. R. Dunne qui tam, &c. vers. Hinchdy.*

Rosewell

Rofewell *vers.* Prior.

Intr. Trin. 13 Will. 3. B. R. Rot. 158.

IN an action upon the case the plaintiff declared, that he the second of October, the ninth of this King was, and long before had been possessed for a certain term of years, *ad tunc venturo et ad huc inexpirato*, in an ancient mesuage, in which there then was, and time whereof, &c. had been, twenty-one ancient lights; that the defendant was possessed of a piece of ground near adjoining to the said house; and that he the said second of October erected there a new house, and occupied and continued it until the twentieth of October the tenth of this King, which stopped the said lights by all the time aforesaid, *per quod* the plaintiff lost the benefit of the said lights. Upon not guilty pleaded, it being tried at the sittings at *nisi prius* at Westminster, before Holt chief justice of the King's Bench; the fact upon the evidence appeared to be, that the defendant was not occupier of the new house the said second of October, nor at any time after, but that he had before built the said house, and had demised it to Shuttleworth rendering rent, who had occupied it for all the time aforesaid. And the question was, if this evidence would maintain the declaration; for it was objected by the defendant's counsel, that it would not; because as the fact appeared to be, an action would not lie against the defendant, but it should have been brought against Shuttleworth. Upon which this fact was stated in a case, and reserved for the opinion of the chief justice by a rule made by consent, and in the mean time the verdict was for the plaintiff subject to the direction of the chief justice. And it was argued by direction of the chief justice several times at the bar of the King's Bench by Mr. Mountague, Sir Bartholomew Shower, and Mr. Weld, for the defendant, and by Mr. Northey, serjeant Darnall, and Mr. Williams, for the plaintiff. And it was urged for the defendant, that this action is only to recover damages, and will not lie against the defendant, who has only a reversion in the term; but the action ought to have been brought against Shuttleworth. *Cro. Jac. 373. Ryppon vers. Bowles. Cro. Jac. 555. Brent v. Haddon.* For though the plaintiff receives damage, yet it is not from the defendant but from Shuttleworth. And it is no objection to say, that an action will not lie against Shuttleworth, because he cannot pull down this house, because it would be waste; for doubtless he might have pulled it down, and abated the nuisance, for a stranger may abate a nuisance, and it will not be waste in him. 2. By the alienation of the builder of the nuisance, the assise of nuisance failed at common law.

S. C. 2 Salk. 460.
 Carth. 454.
 Lilly's Entr. 81, 516.
 Ante 392.
 Tenant of a piece of ground erects a house which obstructs his neighbour's lights, and then demises it; an action lies against him for the stopping of the lights after the demise.
 F. N. B. 124. H. 1 Vent. 48.
 1 Mod. 27.
 6 Mod. 116, 314.
 Salk. 459, &c.
 2 Roll. 144.
 145.
 Cro. Car. 185.
 3 Bull. 197.
 1 Jones 222.
 9 Rep. 55. a.

2 *Inst.* 405. but the party prejudiced might have a *quod permittat* against the alienee being tenant; the reason of which will govern the present case, being an action upon the case. And now by *Westm. 2. cap. 24.* assise of nuisance lies against the erector and the alienee, which would not lie before the said act. 3. This continuance of the nuisance may be compared to an imprisonment, where every detainer amounts to a new imprisonment; nevertheless the man who first made the arrest, is not answerable for the whole. 1 *Roll. Rep.* 241. 4. If the defendant is liable for the continuance and the erection, it shall be intended, that all the damages, as well for the continuance as for the erection, were given in the action brought before for the erection; like the case of *Fetter v. Beale*. See it before, 339, 692.

Against this it was argued for the plaintiff, that this is the only action that the plaintiff can have; for he being only a lessee cannot maintain an assise or a *quod permittat*, and therefore case will lie. *Fitz. nat. bre.* 183. And the action lies more properly against the defendant, than against his lessee; because since the plaintiff erected the nuisance, and then leased it for years, it is a continuance by him; for by his lease he has put it into the hands of a man who cannot abate it for fear of waste, and therefore it is a continuance by him. 2. The action will not lie against *Shuttleworth, Cro. Fa.* 373. *Ryppon v. Bowles*, for he has done nothing; and if he should abate it, waste would lie against him, if his lessor hath the inheritance. 3. It is against the rules and justice of the law, that a man shall take advantage of his own wrong, and deprive another, whom he has injured, of a remedy which the law has given against him, by his own act. 4. He hath a rent from the tenant, in consideration of this nuisance; and therefore it is more just, that he should be liable for the prejudice that he has done. To which it was answered by the defendant's council, that the benefit of the rent which the defendant hath, cannot be a reason to maintain this action; for the same reason would maintain the action against the heir or executor of the defendant, as the case might happen, for the continuance in their time. But that cannot be pretended, for being a personal wrong, it would die with the person; and yet such heir or executor would have the rent reserved.

And this term judgment was given for the plaintiff, for admitting that the action would lie against the defendant or against his lessee (*per curiam*) then the plaintiff should have his election, and a recovery against the one would be a bar in an action brought against the other. *Yelv.* 209. *Spencer v. Com. Rutland*. And it is very reasonable, that the action should lie against the defendant, because he erected it, and for some time continued the enjoyment

of it, and then demised it to *Shuttkworth*, rendering rent, so that he has made an agreement with *Shuttkworth*, that it should continue, and he has a rent for it. He likened it to the case, where *A.* disseises *B.* and then *B.* makes a feoffment in fee to *C.* *C.* takes the profits, then *B.* re-enters; *B.* in trespass against *A.* shall recover all the mean profits received by *C.* 11 Co. 51. *Liford's* case. This action cannot be maintained against the heir or executor of the defendant, because it is a personal wrong, and dies with the person. As to the case put of imprisonment, *Holt* chief justice said, that if *A.* wrongfully arrests *B.* and then *A.* delivers *B.* to *C.* *A.* is guilty of the continuance of the imprisonment. And as to the objection, that damages may be intended to have been recovered in the action for the erection. 1. No such action now appears to have been brought, but in the case of *Fetter v. Beale* the former recovery was pleaded. 2. The damages for the continuance of the nuisance cannot have been recovered in the action for the erection, because they were not then sustained; but the battery was the same at the time of the action brought, and being a transient act did not lie in continuance, and therefore all the damages were given for it in the first action. And judgment was given for the plaintiff.

Foreland *vers.* Hornigold.

Intr. Hil. 11 Will. 3. B. R. Rot. 164, or 564.

DEBT upon a bond, conditioned to perform the award of *J. S. S. C.* 1 Salk. The defendant pleaded, *nul agard fait*. The plaintiff replied, and shewed part of the award, and pleaded it with a *profert in curia*, and assigned a breach. The defendant demurred for variance; and the variance being material, *viz.* in the substantial part of the award, the court gave leave to the plaintiff to discontinue, upon payment of costs. But if the plaintiff had shewn all the part of the award that was good, and had omitted to shew part of the award that was ill in itself and void; upon issue of *nul agard*, that would not have been a material variance. And so *Holt* chief justice said, that it had been ruled before upon evidence at a trial at *nisi prius* at *Guildball*. And *Gould* justice ruled it accordingly at the summer assises in the home circuit. And *per Holt* chief justice, the judges made no distinction between the good part and the bad part of an award till the time of King *James I.*

Vincent

Vincent *vers.* Beston.

Intr. Mich. 13 Will. 3. B. R. Rot. 183.

Discontinu-
ance by plea
to part.

Want of a
continuance
may be amend-
ed in the same
Term.

Assumpsit upon three promises for 55 l. each. The defendant as to the 55 l. mentioned in the first count pleads, that the plaintiff ought not to have his action, for that the said three several assumptions *in narratione superius mentionatae*, were for the same sum of 55 l. which sum of 55 l. the defendant had paid to the plaintiff before the action brought; and for this he prays judgment, if the plaintiff ought to have his action against him. The plaintiff replied, that the defendant did not pay, &c. The defendant demurred. And the court held, that the whole was discontinued, because the defendant pleaded only to the first of the promises, and therefore the plaintiff should have taken judgment by *nihil dicit* upon two of them; but not having done it, the whole is discontinued; for the defendant had fixed his plea by the beginning to the first promise, and therefore the special matter which follows will not aid it. 1 Roll. Rep. 177, 406. But afterwards, this being all done in Michaelmas term, and no continuance being entred upon the roll, the plaintiff entred up judgment by *nil dicit* upon the two promises to which the defendant did not plead. And this was approved by the court, upon a report made of it by the master after reference to him. And judgment was this term given for the plaintiff upon the demurrer. Mr. Cheskyre council with the plaintiff. Mr. Branthwaite with the defendant.

Gree *vers.* Rolle and Newell.

Intr. Hil. 8 Will. 3. B. R. Rot. 664.

S. C. 2 Salk.
456.
S. C. Comyns
113.
12 Mod. 65.
655.
Post. 729.
Cro. Car. 239.
Carth. 21.

Entry of *cestuy
que trust* will
avoid the sta-
tute of limi-
tations.

THE plaintiff brought an ejectment against the defendants Sir John Rolle and Newell, for lands in Devonshire. The defendants appeared, and entred into the common rule in ejectment, and pleaded jointly, not guilty. The cause being brought to trial at the assises at Exeter, Sir John Rolle appeared, and confessed lease, entry and ouster, but Newell did not appear. Upon which the plaintiff entred a *non prof.* against Newell at the said assises. And as to Sir John Rolle the jury found a special verdict; upon which the single question was, whether the entry of *cestuy que trust* would be sufficient to avoid the statute of limitations, 21 Jac. 1. cap. 16. And it was held clearly by the whole court, that such entry was sufficient to avoid the statute; and they would not hear an argument upon

upon the point. And a rule was made, that the plaintiff should have judgment, unless the defendant showed cause to the contrary before the end of *Trinity* term last past. Upon which Mr. Broderick moved to set aside the said rule; because (by him) the *retraxit* is irregularly entered; and the plaintiff after the entry of it ought not to have proceeded, supposing that it had been regularly entered; because by his declaration he supposes, that he has right only against both jointly, which supposal he has falsified by the entry of the *retraxit*, confessing thereby, that he has no right at all against *Newell*. *Sed curia contra*, as to this last matter. For if an ejectment be brought against two, and issue be joined, and then one of them dies, and a *venire* is awarded as to the two defendants, and a verdict against two, yet upon suggestion of the death of one of them upon the roll, the plaintiff shall have judgment for the whole against the other; *Cro. Ja.* 303, 274. *2 Keb.* 845. because this action is grounded upon torts, which are several in their nature, and one may be found guilty, and the other acquitted. Then Mr. Broderick argued, that this *retraxit* was entered irregularly, for (by him) the *non. prof.* must be interpreted a *retraxit* or nothing; for it cannot be a nonsuit, for if it were a nonsuit, then the plaintiff, being nonsuit against one, shall be nonsuit against both. And as a *retraxit* it cannot be good, because the defendants have joined in plea, and therefore neither the plaintiff nor the judge of assize can sever them; and all the cases, where *retraxits* have been adjudged good, were where the pleas were several, and not joint. *Long 5 Edw.* 4. 108. *Bro. judgment* 77. In trespass against several, if the plaintiff enters a *non prof.* against one, he cannot proceed against the rest, unless they sever in plea. 2. The judge of *nisi prius* could not enter a *retraxit* to be good, because upon the entry of it judgment ought to be immediately, that the defendant against whom the *retraxit* is entered, *eat inde sine die*; which the judge of *nisi prius* cannot do, and so this *retraxit* is irregular; the consequence of which is, that *Newell* continued defendant notwithstanding this *retraxit*, and nevertheless the judge tried the issue only against one of the defendants. He cited also *2 Vent.* 105. *Fagg vers. Roberts*, that the plaintiff ought to have been nonsuit, because both the defendants did not confess lease, entry and ouster; and *1 Sid.* 76. *Boulter v. Ford*. *E. contra* it was argued for the plaintiff by Mr. serjeant Darnall, that a *retraxit* may be entered before the judge of *nisi prius*, because the parties are all demandable there, and have day, and their appearance is at the beginning recorded. That such a judge may record a protection. *Co. Md. Chart.* 425. *17 Edw.* 3. 22. The same law of a *receipt prier*. That he may receive a plea *quis darrein continuance*, *Yelv.* 181. but cannot give judgment upon it. That he may record a demurrer to the evidence, or a plea to the challenge of the jury. And for the

Raft. entr.
66, 72.
3 Co. 50.
Sir George
Brown's case.

Retraxit entered before a judge of *nisi prius*.

same reason he may record a *non prof.* In Co. Entr. 172. a *reilla verificatione* with a *cognovit alienum* is entred at *nisi prius*, and judgment given upon it in C. B. in dower, which is strong in point. If in this case the defendants had severed in plea, a *non prof.* might have been well entred. Cro. Car. 243. Now this plea is severable in its nature. See 11 Hen. 7. 6. per Kell. And he cited 20 Affs. 20. 2 Roll. Abr. tit. Trial 630. pl. 13. Hb. 70, 180. 3 Keb. 136. But per Holt chief justice, upon the *non prof.* entred against one of the defendants, judgment ought to have been entred for him, which could not be done at *nisi prius*; and before such entry he is not discharged, and the plaintiff ought not to have proceeded against the other. He had never seen such a *retraxit* as this; and he was of opinion, that a *retraxit* cannot be entred against one of the defendants, where they join in plea. Besides, that before the statute of York the plaintiff could not have been nonsuit at *nisi prius*, because he was not demandable there; and therefore now he cannot enter a *non prof.* there. And therefore he held, that this *retraxit* was irregularly entred, and that the plaintiff ought not to have his judgment. But Powys and Gould justices held the contrary. 1. Because the plea is in its nature severable, and therefore a *retraxit* may be well entred as to one of the defendants. 2. That the judge of *nisi prius* may receive such entry. And judgment was given for the plaintiff. And afterwards error was brought upon this judgment in parliament. And the judgment of the King's Bench was affirmed Saturday 18 April 1702. and 50*l.* costs given to the defendant in error.

Pullen *vers.* Birbeck.

S. C. Salk.
563.
S. C. Carth.
453.
An *elegit*,
which extends
more than a
moiety, is
void, and the
plaintiff shall
have a new
execution.
Ant 346.

IN a *scire facias* sued by the plaintiff against the defendant, the writ shewed, that the plaintiff had recovered judgment against the defendant for 600*l.* and that he sued an *elegit* thereupon directed to the sheriff of *Westmorland*, to which the sheriff returned, that he had levied goods to the value of 66*l.* and that the inquisition found, that the defendant was seised of two farms, the one of 40*l.* per annum, the other of 60*l.* and that he had seised the farm of 60*l.* per annum, &c. that by the said return it appeared, that the execution was void, because he seised more than a moiety; and therefore this writ commanded the defendant to shew cause, why the plaintiff should not have a new execution. To this writ the defendant demurred. And it was argued by Pratt serjeant, that the execution was not void, but voidable, at the election of the defendant who was prejudiced by it. And for that he cited many cases of leases made by infants, by *feme covert* jointly

jointly with their husbands, tenants in tail, bishops, &c. that they were only voidable. 2. That the plaintiff was estopped by his acceptance, to say that the execution was void. And to prove that he cited 22 Edw. 3. 14. 44 Edw. 3. 2. 5. *E contra* it was argued by serjeant Hall for the plaintiff, that the execution was void, because the sheriff had but a bare authority, which he had not pursued, and therefore his act is void. 22 Edw. 4. 3. a. Dier 135. pl. 14. March 8. pl. 20, 117. Co. Li. 49. b. 52. a. Cro. Car. 335. 1 Leon. 35. Hardr. 421. And that this case resembles the case in 7 Edw. 4. 3. as the plaintiff had a new *capias* there, he ought to have a new *elegit* here. 2 Brownl. 96. 7. 1 Sid. 91. Cro. Eliz. 160. 8 Edw. 4. 4. Trespass lies against the sheriff, if he exceeds his authority. 1 Sid. 184. 1 Ventr. 105, 261. That such *elegit* executed in such manner is void. 1 Sid. 239. As to the opinion 2 Inst. 396. that an extent cannot be avoided, after it is filed; that is where there does not appear to be more than a moiety upon the extent itself. And so it is explained by Hale, 1 Ventr. 259. 3 Keb. 313. And therefore he concluded, that the plaintiff ought to have a new execution. And of that opinion was the whole court after several arguments at the bar. And this term they said, it was a plain case, that the execution was void, the sheriff having exceeded his authority. And judgment was given for the plaintiff.

Vasper *vers.* Eddowes.

Intr. Pasch. 12 Will. 3. B. R. Rot. 316.

Trespass for his close broken, and depasturing of his grafs with cattle, &c. *viz.* porcis, &c. As to all the trespass, except with one hog, the defendant pleads not guilty; and as to that he pleads in bar, that the plaintiff distrained the said hog then damage feasant, and impounded it in the common pound of the manor *nomine districtionis*, &c. The plaintiff replied, confessing the distress, and the impounding, that the hog without the assent of the plaintiff escaped out of the said pound, the plaintiff *adunc nec adhuc*, not being satisfied for the said damage. The defendant demurred. And Raymond argued for the plaintiff, that it appears, that the plaintiff had no satisfaction for the said trespass, and therefore may maintain this action. That the hog, though distreined, was but in nature of a pledge; and that upon tender of the damages by the defendant to the plaintiff, he ought to have permitted him to have the hog. Cro. Eliz. 162. 2 Leon. 174. pl. 211. *Annesley vers. Johnson*. Replevin after a writ of second deliverance, the defendant avowed for damage feasant, upon which

S. C. 1 Salk. 248. Trespass, the defendant pleads distress and impounding of a hog for the same trespass, the plaintiff replies, escape out of the pound. 12 Mod. 660. 11 Mod. 21. S. C. of Vasper v. Edwards. Blencowe's M. S. Rep. 1 Vol. 214. *ex relatione* P. Willson. issue

Dier 280.
Hob. 61.
Mich. 1 Edw.
4. 10.
Mich. 15 Edw.
4. 10. b.
10 Hen. 7.
21. b.

issued was joined, and verdict for the steward, and damages were assessed, and return awarded, the sheriff returned *curia clausa*, upon which a *withernam* was awarded of the castle of the plaintiff, upon which the plaintiff came into court, and tendered the damages assessed by the jury, and brought the money into court, and prayed a stay of the *withernam*, the court imposed a fine of 3*l.* and 4*d.* for his contempt, and then granted his prayer. So 2 *Inst.* 341. if return irrepleviable be awarded, the owner may offer the arrearages, and if the defendant refuse to deliver the distress, the plaintiff may have detinue, because the distress is only in nature of a pledge. 13 *Hen.* 4. 17. 4. 2 *Inst.* 107. *Cro. Jac.* 148. The distrainer cannot use it. *Yelv.* 96. *Noy* 119. He cannot tie them in the pound. 27 *Affiz.* 64. If cattle distrained die in the pound, the distrainer shall have an action of trespass; or may distrain again, if the distress was for rent. *Doct. and Stud. cap.* 27. which seems a strong case in point. As to the objection, that *levy per distress* is a good plea, he answered, that such plea ought to mention, *quod adhuc detinet*, or *quod sic nil debet*, otherwise it will not be good, which supposes satisfaction. See 28 *Hen.* 6. 6. 35 *Hen.* 6. 10. 36 *Hen.* 6. 48. *Rast. entr.* 175. *Co. entr.* 49. b. And therefore he concluded, that such distress being become by the fault of the defendant (for he ought to have made satisfaction for the trespass) ineffectual, the plaintiff may have trespass.

And after this case had been stirred many times at the bar, this term the court gave their judgment. And Gould justice for the reasons aforesaid was of opinion, that the plaintiff ought to have judgment. But Holt, Turton, and Powys, justices, gave judgment for the defendant, because it did not appear, that the hog escaped by the default of the defendant; for perhaps it escaped by a fault in the pound; and it would be very hard, that the defendant should lose his pig, and also make other satisfaction to the plaintiff for the damage done by it. Note, that Holt chief justice always when this case was stirred, was angry, by reason of the smallness of the cause of action, and said, that it was a vexatious suit, more worthy to be brought in the county-court than in the King's Bench. Judgment was given for the defendant.

Milner *vers.* Petit.

Debt against
the bail upon
the recogni-
sance.

DEBT was brought against the defendants as bail upon their recognisance. The judgment against the principal was given in Trinity term; and if the plaintiff had sued in *scire facies*, the bail would have had time to bring in the defendant, until the return of the *scire facies*, whereof they are deprived by this mean.

And therefore Mr. *Mumfry* prayed, that the defendant might have an imparlance. And he said, that some books are, that in such case debt does not lie. And for that he cited *Reym. 14*. But *per curiam* the bail shall have the same time for the render of the principal, as if they had been sued by *scire facias*; and a rule shall be made accordingly. In the *scire facias* they cannot plead the render after the return of the *capias ad satisfaciendum*, because the condition of the recognisance is broken by the return of *non est inventus* upon the *capias ad satisfaciendum*. And they said, that the bail should have fifteen days in the term; and in vacation they should have as much time as they would have had, if they had been sued upon a *scire facias*, to render the principal. But afterwards at the end of the term *Holt* chief justice said, that the judges had made a rule, that if the plaintiff in the original action brings debt against the bail upon their recognisance, the bail shall have eight days after the return of the writ, to render the principal; and if there are but four days in the term after the return of the writ, he shall have four days in the following term.

Time to render the principal.

Ante 156.

Rex *vers.* Cranmer.

AN indictment was found against the defendant. And after he had pleaded not guilty, and it had hung up untried for some time, the prosecutor discovering a fault in the indictment, being for perjury, went to Mr. *Harcourt*, secondary of the crown office of the King's Bench, and perswaded him, to procure Sir *Samuel Astrey*, clerk of the crown, to enter a *nolle prof.* Upon which Mr. *Raymond* moved the King's Bench, that such *nolle prof.* might not be entred without leave of the attorney general. And of that opinion was the whole court. And the *nolle prof.* was set aside.

S. C. Cases
B. R. 64.
Clerk of the crown cannot enter a *nolle prof.* upon an indictment without leave of the attorney general.

Philips *vers.* Philips.

Hil. vacation 14 Will. 3.

A Seised of lands in fee devised them to B. and C. and their heirs, in trust that his wife *Elizabeth* and her daughter *Martha* should have the profits equally divided between them during the life of *Elizabeth*, and afterwards to B. and C. and their heirs, in trust for the heirs of the body of *Martha*, afterwards to his right heirs; *Martha* died before *Elizabeth* without issue, *Elizabeth* took out administration to *Martha*. And upon a bill in Chancery, the cause being heard by the master of the rolls, he

S. C. 2 Vern.
430.
Abr. cas. eq.
292.
1 Williams
34.
2 Freem. 11,
247.
Tenancy in common.

held, that *Elizabeth* and *Martha* were jointenants, and that the whole survived to *Elizabeth*. Afterwards upon appeal to *Somers* lord chancellor, he held, that *Elizabeth* and *Martha* were tenants in common, and that the estate as to *Martha* determined by her death, and then he in remainder would come into possession for her moiety. Afterwards upon a rehearing before *Wright* lord keeper of the great seal, he held them to be tenants in common; but he was of opinion, that an estate by implication arose to *Elizabeth*, after the death of *Martha*, for her life. But he made a reference of it to the opinion of the judges of the Common Pleas. And they held, that they were tenants in common, and that *Pur autur vie*. *Martha* had an estate *pur auter vie*, and that so the special occupant should have it, *viz.* *Elizabeth*, as her administratrix; that *Martha* had no estate tail in the trust, because equity never makes a merger, but prevents it; contrary to that which lord *Somers* held.

Equity never makes a merger.

Rex *vers.* Dawes.

S. C. 2 Salk. 608.
Sheriff may take a bail-bond upon attachment.
Vide 10 Rep. 99, 100.
1 Salk. 99, 175.
Mod. 122.

B. R. will not compel the plaintiff to accept an assignment of the bail-bond.

AN attachment issued out of this court against the defendant, for a contempt committed by him, directed to the sheriff of *Cumberland*. Upon which the defendant being arrested, *Thomas Lamplugh* esquire, sheriff of the said county, took a bail-bond (in which persons very sufficient were bound for his appearance at the return of the attachment) and let him go at large. The defendant refused to appear at the day of the return of the writ, which was *die Veneris proxime post crastinum sanctae Trinitatis* last past. Upon which the sheriff was amerced; though he offered to the plaintiff in the action to assign him the bail-bond, which he refused, alleging that the sheriff could not take a bail-bond upon an attachment. Upon which the sheriff, thinking he was oppressed, moved by Mr. *Raymond* last *Michaelmas* term, that the court of King's Bench would compel the plaintiff to accept the assignment of the bail-bond. And he urged, that it was very reasonable, that such a rule should be made; for the sheriff is compellable by the statute, to let a man arrested upon an attachment go at large upon a bail-bond given; and when he is at large, the sheriff cannot seize him again after the return of the writ; and consequently it is not then in his power, to bring him in at the return of the writ. It will then be very hard, that when he has done his duty, and no more, he shall be liable to amercements, for not doing that, which the law says, he cannot do lawfully. That no action lies against him in such case. 2 *Saund.* 54. *Posterne v. Hanson.* 1 *Sid.* 23. And if no action lies, no more ought he to be amerced for it. *Sed non allocatur.* For *per curiam*, this court cannot make such a rule, that

that the plaintiff shall accept the assignment of the bail-bond; for he may either accept it, or proceed against the sheriff by amercements; and the sheriff may reimburse himself, by suing the bail-bond; and if the bail-bond is not sufficient (as here it was but of 40*l.*) he is without remedy. But it was clearly agreed, that he may take a bail-bond upon an attachment. See *Stile* 212, 234. *Burton v. Low*. 2 *Ventr.* 237. *Contra* 3 *Leonard* 208. *Bland v. Riccards*. Afterwards the last day of this term, upon alleging that this was a hard case, and that *Dawes* was in town, the court granted a tipstaff, to bring him in *sedente curia*; but he could not find him. And so nothing was done for the relief of the sheriff.

Some

Some POINTS resolved by *Holt* chief justice of the *King's Bench*, upon evidence in trials at *nisi prius*.

Sentence of condemnation of a ship destroys the property thereof. See 2 Mod. 231. and 2 Stra. 960, 961.

IN an action brought upon a policy of insurance of a ship, if it appears upon the evidence, that the ship was condemned by process of law, and seized; by this sentence the property and ownership are destroyed, and there is no remedy upon the policy of insurance. Ruled by *Holt* chief justice *May* 31. at *Guildhall, Pasch. 10 Will. 3. 1698*.

Smith assignee of the commissioners of a bankrupt *vers.* Sir Richard Blackham.

S. C. Salk. 283. but not the same point. Whether necessary to prove the petitioning creditor's debt.

IT was ruled by *Treby* chief justice of the Common Pleas, at *nisi prius* at *Guildhall*, the sitting after *Michaelmas* term 10 *Will. 3.* upon evidence in trover brought by the plaintiff against the defendant, after argument of the council on both sides, 1. That it is not necessary to prove, that the person, upon the petition of whom the commission of bankruptcy was granted, was a creditor of the bankrupt; because upon view of the statutes, they do not require that. 2. That it is not necessary to prove, that the bankrupt was indebted in 100*l.* though the practice has been to do so; because though the chancellor frequently, before he grants a commission of bankruptcy, requires such proof, yet it is only matter of discretion in him.

Cole *vers.* Davies et al', assignees of Maul a bankrupt.

How the property of goods bound by an execution, or act of bankruptcy, &c.

IT was ruled by *Holt* chief justice of the King's Bench, *Tuesday Jan. 31. Hil. 10 Will. 3.* at *nisi prius* at *Guildhall*, upon evidence in a trial, 1. That if the goods of *A.* be seized upon a *feri facias* issued upon a judgment obtained against *A.* and after the seizure *A.* becomes bankrupt; this act of bankruptcy cannot affect the goods levied in execution as aforesaid. But if *A.* was a bankrupt before the seizure, and after the bankruptcy the sheriff upon a writ of *feri facias* to him directed upon a judgment obtained against

against *A.* seises the goods and sells them, and a commission of bankruptcy is granted, and the said goods assigned by the commissioners, the assignee of the commissioners may maintain trover against the vendee of the goods; but no action will lie against the sheriff, because he obeyed the writ. 2. If a trader, hearing that a writ of *fiery facias* was issued against him, to the intent to preserve his goods from being levied in execution, clandestinely conveys them out of his house, and conceals them privately; that does not amount to an act of bankruptcy. 3. That a seizure of part of the goods in a house by virtue of a *fiery facias* in the name of the whole, is a good seizure of all. 4. It was resolved in this case, that if goods of *A.* are seised upon a *fiery facias*, and sold to *B.* *bona fide* upon valuable consideration; though *B.* permits *A.* to have the goods in his possession, upon condition that *A.* shall pay to *B.* the money, as he shall raise it by the sale of the goods, this will not make the execution fraudulent. And in such case a subsequent act of bankruptcy by *A.* will not defeat the sale. But though the original debt was just, yet if the execution was fraudulent, *viz.* upon any trust, a subsequent act of bankruptcy will defeat it.

Young vers.

IT was ruled at *nisi prius* at *Westminster*, the first sitting after *Michaelmas* term 10 *Will.* 3. that every man of common right may justify the going of his servants or of his horses upon the banks of navigable rivers, for towing barges, &c. to whomsoever the right of the soil belongs. And if the water of the river impairs and decreases the banks, &c. then they shall have reasonable way for that purpose in the nearest part of the field next adjoining to the river. And he compared it to the case, where there is a way through a great open field, which way becomes foundrous; the travellers may justify the going over the outlets of the land not inclosed next adjoining.

Towing
barges, &c.
on the banks
of navigable
rivers.

*See Hargrave's
Law vol. 1. p. 85.
26. 27.*

Maynard's
MS. Rep.

PER Holt chief justice, the inhabitants of every parish of common right ought to repair the high ways. And therefore if particular persons are made chargeable to repair the said ways by a statute lately made, and they become insolvent, the justices of peace may put that charge upon the rest of the inhabitants. *Mich.* 10 *Will.* 3. *B. R.*

Highways.
1 Vent. 183.
Hawk. P. C.
202. f. 5.

Hockley *vers.* Lamb.

Prescription
for cattle *levant*, &c. on
a mesuage.
2 Lev. 67.

But not upon
a farm, be-
cause that is
uncertain.

IT was ruled by *Holt* chief justice at *Winchester Lent* assises 10 Will. 3. 1. That a man may prescribe for common for cattle *levant* and *couchant* upon a mesuage. And he said, that he knew *Hale* chief justice to have been of the same opinion at *Norfolk* assises. 2. By him a man cannot prescribe for common appurtenant to a farm; because it is uncertain, of what a farm consists, perhaps of ten acres, or of a hundred acres; but the prescription ought to be laid, to a mesuage and so many acres of land. But if there is an ancient farm, and the same lands always occupied with it; a man may have common of pasture, to depasture his cattle tilling that farm.

Richards *vers.* Squibb.

Where not
necessary to
shew cattle
were *levant*
and *couchant*.
Post. 1015.

IT was ruled by *Holt* chief justice at *Dorchester Lent* assises 10 Will. 3. at a trial at a *nisi prius*, that if a man prescribes for common for a certain number of cattle, as appurtenant, &c. it is not necessary, nor material, to shew that they were *levant* and *couchant*; because it is no prejudice to the owner of the soil, for that the number is ascertained.

Clerk *vers.* How.

A surrender
by one intitled
to be admitted
to a copyhold
before an
actual entry is
ill.

IT was ruled by *Holt* chief justice at *Brentwood summer* assises 10 Will. 3. upon evidence at *nisi prius*, that if copyhold land be surrendered to the use of a will, &c. and afterwards the will devises this land to *B.* and his heirs, upon condition that he pay 100*l.* within six months after the death of the devisor to *J. S.* if the money is not paid, *J. S.* ought to be admitted, and then he must make an actual entry before he can surrender. And therefore in the present case a surrender made by *J. S.* before actual entry was held ill.

Boner *vers.* Juner.

Coparceners
may join in
ejectment.

IT was ruled by *Holt* chief justice at *Rygate* in *Surrey summer* assises 10 Will. 3. upon evidence at a trial, that coparceners may join in ejectment. And (by him) the case in *Moor* 682. n. 939. is not law.

Palmer

Palmer *vers.* Hooke or Gouche.

IT was ruled by *Holt* chief justice, upon evidence at a trial at *nisi prius* at *Norwich* summer assises 12 *Will.* 3. that if in *indebitatus assumpsit* for goods sold and delivered, upon *non assumpsit* pleaded the defendant gives in evidence, that the debt was attached by foreign attachment in *London* upon a plaint levied by *J. S.* (to whom the plaintiff was indebted) against the plaintiff, &c. the defendant will be driven to prove, that the plaintiff was indebted to *J. S.* because the plaintiff has no notice of the foreign attachment; and therefore it may be only a contrivance by the defendant and *J. S.* to bar the plaintiff of his present action. 2. In such case the plaintiff may shew in evidence, that the suit in *London* was after an original filed by the plaintiff in some one of the superior courts; and that will avoid the operation of the foreign attachment. 3. If the original did not issue before the plaint was entered in *London*, but only was antedated, and bore *teste* before, and no arrest was made before upon it; that will not avoid the foreign attachment. But this latter point *Holt* reserved for his farther consideration. But (*ut audiui*) he was afterwards of the same opinion.

Windle *vers.* the hundred of Chelmsford.

IN an action upon the statute of *Winchester*, in which the plaintiff shewed, that he was robbed of a Bank bill, upon evidence at the trial, summer assises 10 *Will.* 3. at *Brentwood* in *Essex* before *Hatfield* baron of the Exchequer, he directed the jury to give damages for the whole value of the bill, which they did accordingly.

Smithies *vers.* Dr. Harrison.

IN case for words, which imported the committing of adultery by the plaintiff with *Jane at Stile*, the defendant in mitigation of damages may give in evidence, that the plaintiff committed adultery with *Jane at Stile*, but not with any other woman. *Per Holt* chief justice at *Brentwood* summer assises 13 *Will.* 3. ruled accordingly.

Hastead

Hastead vers. Searle.

By a devise of lands in Surrey in possession of J. A. land in *Hants* in possession of J. A. pass.

A. Makes his will in these words, viz. "I devise to J. S. all those my lands in *Bramsted* in the county of *Surrey* in the possession of *John Asbley*;" whereas in fact *A.* had not any lands in *Surrey*, but he had lands in *Bramstead* in *Hampshire* in the possession of *John Asbley*. And in an ejectment brought by the heir of *A.* for these lands in *Hampshire* against the devisee, it was ruled by *Holt* chief justice, that these lands in *Hampshire* would pass by this devise. And the plaintiff was nonsuit. At *Winchester* Lent assises 1679. 10 *Will.* 3.

Lord Petre vers. Heneage.

A jewel cannot be an heir-loom.

PER *Holt* chief justice, a jewel cannot be an heir-loom, but only things ponderous, as carts, tables, &c. Ruled by *Holt* at the sitting in *Middlesex* after *Easter* term 13 *Will.* 3. in trover for a chain of pearl. See *Co. Li.* 18. b. that the ancient jewels of the crown are heir-looms.

Emerson vers. Inchbird.

Where an heir shall not take by devise but by descent.

IN debt upon bond brought against the defendant as heir to his father, &c. *riens per descent* pleaded, the plaintiff replied assents, and issue thereupon. And the evidence was, that the obligor, the defendant's father, devised to the defendant his son and heir certain mesuages in *Exchequer Alley* in fee, but chargeable with an annuity or rent charge payable to the defendant's mother. And it was held by *Holt* chief justice, that these mesuages descended to the defendant, and were assents. For (by him) the difference is, where the devise makes an alteration of the limitation of the estate, from that which the law would make by descent; and where the devise conveys the same estate, as the law would make by descent, but charges it with incumbrances. In the former case the heir takes by purchase, in the latter by descent. *Trin.* 13 *Will.* 3. *B. R. Guildhall, London. see acc. 2. Burr. 279.*

Devise in ejectment laid before the time of trial.

IN ejectment the demise by the lessor of the plaintiff to the plaintiff was laid to be the twenty-seventh of *April* 1697. which time was not come at the time of the trial; but the tenant had entred into the common rule, to confess lease, entry and

and ouster. And the court compelled the defendant to confess lease, entry, and ouster; otherwise the plaintiff would have been nonsuit, and then he would have had judgment against the casual ejector; although it was objected, that the plaintiff could not have judgment, though the verdict were found for him. Ruled by the court of King's Bench upon a trial at bar. *Mieb. 8 Will. 3. B. R.*

Claxmore *vers.* Searle, Field, and Falkner.

Claxmore brought an ejectment against Searle, Field, and Falkner. Field appeared, and confessed lease, entry, and ouster. Searle and Falkner did not appear, nor confess lease, entry and ouster. Upon which, by the direction of Holt chief justice at the summer assizes at Horsham in *Suffex 13 Will. 3.* a verdict was given by the jury for the plaintiff against Field generally: and verdict was given against the plaintiff for Searle and Falkner; and indorsement was made upon the *posse* that this verdict was for Searle and Falkner, because they did not appear and confess lease, entry, and ouster: and for this reason, that they should not have costs against the plaintiff, and that the plaintiff should have judgment against the casual ejector, for such lands as were in the possession of Searle and Falkner.

Three defendants in ejectment, one confesses and the others do not. Verdict for plaintiff against the one who confessed, and against plaintiff for the two who did not. Plaintiff recovers all the lands notwithstanding. *Ans 716.*

Hermitage *vers.* Tomkins.

IT was ruled by Holt chief justice, at the summer assizes at Warwick *11 Will. 3.* upon a trial at *nisi prius*, that if *A.* not having any thing in certain land, demises it by indenture to *B.* and afterwards *A.* purchases the land, this will be a good lease by estoppel. But if it appear by recitals in the lease, that *A.* had nothing at the time of the demise, and afterwards he purchases the land as aforesaid, that will not enure by estoppel. 1699.

One demises lands before he hath them, and afterwards purchases them, this lease shall estop him.

Rex *vers.* Payne.

IT was moved in *B. R.* that the information of *B.* (now dead) taken before a justice of peace might be read as evidence for the King in an information against the defendant for a libel, upon not guilty pleaded, tried at the bar. But upon consideration the court denied the motion. For *per curiam*, in indictments for felony, by *2 Phil. & Mar. cap. 20.* such informations may be read, the deponent being dead. But in indictments or informations for misdemeanors, or in civil actions, or appeals of murder, no such information

S. C. Salk. 281. Carth. 405. 5 Mod. 163. Information of one dead taken before a justice for a libel refused to be read in evidence. 2 & 3 Phil. & Mar. cap. 10.

mation can be given in evidence; nor can evidence, which was given for the King upon an indictment, be given upon a trial in a civil action for the party. And the justices of the King's Bench sent Sir Samuel Eyre *puisne* justice of the King's Bench to the justices of the Common Pleas then sitting in court, to learn their opinion; and they agreed in opinion with the court of King's Bench. And the information of B. was refused to be admitted in evidence.

Legatee when a good witness to prove a will.

2 Stra. 1253.

Mich. 31

Geo. 2. B. R.

A creditor held a good witness to a will of lands for payment of debts. See Burn's Eccl. Law, Wills.

Duplicate of a will sent in a letter to a stranger who dies, the letter may be read in evidence.

Where the will must be produced, and confession by a witness that there was such a will is no proof.

A verdict for one remainder-man is evidence for a subsequent remainder-man.

What one swore at a former trial may be proved at another trial if he is dead.

Pyke *vers.* Crouch.

IT was resolved *Mich. 8 Will. 3. in B. R.* upon evidence in a trial at bar, 1. That a legatee cannot be a witness to prove the will, because the legacy is devised to him, unless he has released the legacy. But after such a release he will be a good witness to prove the will. But if the counsel of the other side have permitted such legatee to be sworn, and to be examined as a witness, without having taken exception against him, they cannot afterwards except against his evidence for the reason that he was a legatee. 2. If the duplicate of a will be written by the direction of the testator, and sent by him to a stranger, to keep it safely, and the stranger sends back a letter to the testator, in which he makes mention, that he has received the said will; after the death of the stranger such letter may be read as circumstantial evidence, to prove that such duplicate of the will was sent by the testator to the said stranger. 3. If a man produced as a witness for the plaintiff in ejectment confesses, that there was such a will made as the defendant's counsel pretends, and under which the defendant makes title to the lands in question; yet that is not sufficient proof, to prove that there was such a will; but the will itself ought to be produced, or other legal proof made of it. 4. If several estates in remainder be limited in a deed, and one of the remainder-men obtains a verdict for him in an action brought against him for the same land; that verdict may be given in evidence for the subsequent remainder-man, in an action brought against him for the same land, though he does not claim any estate under the first remainder-man, because they all claim under the same deed. 5. If a man was sworn a witness at a former trial, and gave evidence, and died; the matter that he deposed at the former trial may be given in evidence at another trial, by any person who heard him swear it at the former trial.

Hockley *vers.* Lamb.

IT was ruled by *Holt* chief justice, at *Lent* assises at *Winchester* *A. B. C. D.* 1697-8. That if *A. B. C. D.* and *E.* claim common in a place called *Dale*, exclusively of all other persons, and the common of *A.* comes in dispute, *B.* may be a witness to prove that *A.* has right of common there; because in effect it charges himself, *viz.* he admits another to have common with himself. But if the prescription be, that all the inhabitants of *Blackacre* ought to have common there; one of the inhabitants cannot be a witness, to prove that another of the said inhabitants ought to have common there, because in effect he would swear to give himself right of common there.

IT was said by *Holt* chief justice in *B. R. Mich. 10 Will. 3.* that if a man destroys a thing that is designed to be evidence against himself, a small matter will supply it. And therefore the defendant having tore his own note signed by him, a copy sworn was admitted to be good evidence, to prove it.

St. Legar *vers.* Adams.

AT a trial in ejectment, *summer* assises 10 *Will. 3.* 1698. at *Canterbury* in *Kent*, upon the evidence it appeared, that a will was made by *William Horn* in 1647. of the lands in question, which will was lost, but mention was made of it in the calendar (which is the index of the register of the Spiritual Court) and also in the seal book. A commission issued in *April* 1648. to examine the executors upon their oaths, &c. and that being returned, probate was granted the eleventh of *May* 1648. which probate was produced in evidence. And *Holt* chief justice allowed it to be good proof of the will, but he reserved it for his further consideration. Afterwards the parties agreed. But *Holt* chief justice afterwards, as well in the King's Bench as at *nisi prius*, upon other trials declared, that he held it to be good evidence, and that he continued of his former opinion. And he then said, that without doubt the register's book is good evidence to prove a will.

AT

AT Rygate in Surry, summer assises 10 Will. 3. it was ruled by Holt chief justice, upon the evidence, that because in the Spiritual Court after probate of a will six months are allowed to register it, and when it is registered, it is registered by the original, but the probate is signed by the register only upon the attestation of the proctor and the examination of him; therefore a will proved in 1666 in the archdeacon's court of London, and the office was burnt in the fire of London soon after, and the probate was produced in evidence to prove the will with all these circumstances; it was denied by Holt chief justice to be good evidence to prove the will.

This seems to have been a will of lands, for as to personal estate the probate is sufficient proof of a will.

Kent *vers.* Wright.

Special matter may be given in evidence on the general issue in an action on the case for stopping the plaintiff's lights.

AT a trial at Hertford, summer assises 10 Will. 3. in case for stopping the plaintiff's lights, the defendant pleaded, not guilty; and gave in evidence, that the corporation of Hertford were lords of the soil where, &c. and prescribed to set up stalls there, being near the market-place. And it was admitted by Holt chief justice to be given in evidence upon the general issue, because this is to claim property in the soil; but where the defendant, or he under whom he claims, claim only a particular benefit, as common, or easement, as a way, and not the property in the soil; he ought to plead it specially, and cannot give it in evidence upon the general issue pleaded.

What proof the condemnation of a ship is requisite.

IT was ruled by Holt chief justice, May 31. Pasch. 10 Will. 3. at Guildhall, that in an action upon a policy of assurance of a ship, if the plaintiff's witness swears, that the ship was condemned by process of law, it is good evidence to prove it; but if the defendant had offered that matter in evidence by his witnesses, it would not have been sufficient without producing the sentence of condemnation.

Pitman *vers.* Maddox.

S. C. Salk.

690.

Shop-book.

A Taylor's debt book

where allowed

good evidence

without proof

of delivery of

the goods.

IN *indebitatus assumpsit* upon a taylor's bill, upon *non assumpsit* pleaded, and trial before Holt chief justice, at the sittings for Middlesex, 14 Feb. 11 Will. 3. the plaintiff produced in evidence his shop-book written by one of his servants, who was dead. And upon proof of the death of the servant, and that he used to make such

such entries of debts, &c. It was allowed by Holt chief justice to be good evidence, without proof of the delivery of the goods, &c. And he said, this was as good proof, as the proof of a witness's hand (who was dead) subscribed to a bond, &c. And (by him) notwithstanding the statute of 7 Jac. 1. cap. 12. says, that a shop-book shall not be evidence after the year, yet he did not hold such book to be good evidence within the year alone.

Lake *vers.* Billers & al'.

IN trespass brought against the sheriff for goods taken, upon not guilty pleaded, he gave in evidence, that he levied them in execution by virtue of a *fieri facias*. The plaintiff made title to the goods by a prior execution, but fraudulent, and by bill of sale made of them to him by the officer, *viz.* the sheriff predecessor to the defendant. And upon this trial before Holt chief justice at Hertford, lent assises 1698. 11 Will. 3. it was ruled by him, after argument of the counsel of both sides, that the defendant, though sheriff, ought to give in evidence a copy of the judgment. But it would have been otherwise, if the trespass had been brought by the person against whom the *fieri facias* issued.

In trespass against the sheriff for taking goods on an execution, he must give the judgment in execution. 1 Salk. 109. See 1 Lev. 95, 173. 3 Lev. 20.

IN debt upon bond brought by J. S. sheriff of the county of, &c. The defendant pleaded, that the said bond was acknowledged by J. N. to the plaintiff for the office of undersheriff, and that he was surety in the said bond; and then he pleaded the statute of 5 & 6 Edw. 6. cap. 16. against buying and selling offices, &c. And upon the trial A. was produced as a witness, to give an account, upon what occasion this bond was acknowledged, &c. And Holt chief justice, before whom the cause was tried Mich. 5 Will. & Mar. at the sittings for Middlesex, refused to admit A. to be a witness, because it appeared, that he was privately intrusted by both parties, to make the bargain, and to keep it secret. And (by him) a trustee shall not be a witness, in order to betray the trust.

One privately intrusted by both the sheriff and undersheriff touching a bond given for the office of undersheriff refused as a witness.

IN *indebitatus assumpsit* upon an *in simul computasset*, and *non assumpsit* pleaded, it appeared upon the evidence at the trial at lent assises at East Grinstead in Sussex, 1699. 11 Will. 3. that the debt for which the account was made, was in right of A. to whom the plaintiff was executor. And Holt chief justice seemed to be of opinion, that it was against the plaintiff; but ordered that it should be saved as a point for his opinion, and that in the mean time the plaintiff should have a verdict subject to his opinion.

Goring *vers.* Evelin.

Answer to interrogatories in Chancery must be proved by the examiner himself.

IT was ruled by *Holt* chief justice at *Lent* assises at *East Grinstead* 11 *Will.* 3. 1699. that if an answer to interrogatories in Chancery be given in evidence at a trial, they ought to be proved by the examiner himself, to have been taken the same day that is mentioned upon them.

Sir John Bridgman *vers.* Jennings.

Old survey of two manors when allowed in evidence.

IT was ruled by *Holt* chief justice at *Summer* assises at *Warwick* 1699. that if *A.* be seised of the manors of *B.* and *C.* and during his seisin of both, he causes a survey to be taken of the manor of *B.* and afterwards the manor of *B.* is conveyed to *E.* and after a long time there are disputes between the lords of the manors of *B.* and *C.* about their boundaries; this old survey may be given in evidence. And so it was done in this case. *Contra* if the two manors had not been in the hands of the same person at the time of the survey taken.

Wood *vers.* Drury.

Two witnesses to a deed, one is blind, he who can see may prove the deed, proving also the hand of the blind man.

AT *Summer* assises at *Warwick* 1699, a deed was produced, to which there were two witnesses, one of whom was blind. It was ruled by *Holt* chief justice, that such deed might be proved by the other witness, and read; or might be proved without proving that this blind witness is dead, or without having him at the trial, proving only his hand. And so it was done in this case.

Sherwood *vers.* Adderley.

Debt against the heir. *Riens per discent.* Heir gave evidence of an extent on a bond to the King, a copy of the bond or the bond itself ought to be proved.

DEBT against the heir upon the bond of the ancestor, &c. *Riens per discent* was pleaded. The heir gave in evidence an extent against him upon a debt owing by his father upon bond to the King. And it was ruled by *Holt* chief justice, that a copy of the bond sworn, or the bond itself ought to be given in evidence, the suit being by a creditor, otherwise the extent should not be allowed. And for want of this *Holt* disallowed such extent. *Summer* assises 1699. at *Darby*. And next morning in another trial between *Horne* and the said defendant *Adderley* the bond

bond acknowledged by his ancestor to the King was produced in evidence, the issue being the same as in the other action.

Smith vers. Veale.

AT *Lent* assises at *Tbetsford* 12 *Will.* 3. 1699. *Holt* chief justice refused to admit depositions in Chancery to be given in evidence, after the bill was dismissed. But it was reserved as a point for his further consideration. And after consideration, and conference had with the practisers in Chancery, he gave his opinion, that notwithstanding such dismissal of the bill, the depositions were good evidence. And so he ruled it afterwards at *Guildhall* the fittings after *Hilary* term, 1 *Annae.*

Depositions are good evidence, though the bill in chancery be dismissed.

IN case upon a special promise, to deliver good merchandisable wheat, upon *non assumpsit* pleaded, at the trial, *Lent* assises 12 *Will.* 3. at *Bedford* before *Holt* chief justice, the plaintiff's witness swore, that it was agreed, that he should deliver good second sort of wheat. And *Holt* held this a variance, and the plaintiff was nonsuit.

Case on promise to deliver good, proof of delivery of good second sort of wheat is bad; plaintiff nonsuit.

THE dispute was between the lord of the manor and the devisee of a copyhold of the same manor. And it was ruled by *Holt* chief justice *Lent* assises 1693 at *Cambridge*, that the recital of the will in the copy of the admittance was good evidence of the devise against the lord or any other stranger. But if the suit had been between the heir of the copyholder and the devisee, the will itself ought to have been produced. 2. He ruled, that the foul draught of the steward of the manor of the admittance was good evidence. *Ex relatione m^ri Place.*

Between lord and devisee of a copyhold, recital of the will in the admittance is good evidence. *Aliter* between the heir and a copyholder. Foul draught of the steward evidence of admittance.

Hampton vers. Lammas.

JUSTICES of peace make a warrant to levy a poor's rate upon *J. S.* which was directed to the constables of the parish of *A.* *J. S.* had land in *A.* upon which he had no chattels; but his house stood in the adjoining parish of *B.* in the same county, in which *J. S.* had goods. The constables of *A.* levied these goods by virtue of the said warrant. And *Holt* chief justice ruled upon evidence at the trial at *Hertford Summer* assises 1698, that the goods were well levied. *Ex relatione.*

Poor rate levied by a warrant of justice of peace, in where good.

vers.

736 Points resolved by Holt chief justice,

vers. Norman et al.

Constable may execute a warrant out of his liberty.

IT was ruled by *Holt* chief justice at *Westminster* 14 Feb. 1698, that a constable may execute the warrant of a justice of peace, &c. out of his liberty, but he is not compellable to execute it there.

Rex vers. Woodward.

Sheriff under extent against A. seises B.'s goods, trover lies not.

IF the sheriff upon an extent for the King against A. seises the goods of B. B. cannot have trover against the sheriff, because by the seisure the property vested in the King. Ruled by *Holt* chief justice at the *Summer* assises at *Warwick* 1699, 11 Will. 3.

Rawlins vers. Turner.

A good parcel lease for three years must begin from the time of the agreement, and not after.

IT was ruled by *Holt* chief justice at *Lent* assises at *Kingston* 1699, that such lease for three years of land; as will be good without deed within the 29 Car. 2. cap. 3. must be for three years to be computed from the time of the agreement; and not for three years to be computed from any day after.

Rex vers. Woodward.

Traverse of inquisition upon extent in aid, verdict part for the king, and part for defendant; defendant must pay the fees in court, &c.

AN extent in aid found *Andrews* debtor to the King, and *Thomas Woodward* debtor to *Andrews*; upon which the goods of *Thomas Woodward* were seised in the hands of *John Woodward*; *John Woodward* came in, and traversed the inquisition, that they were not the goods of *Thomas Woodward*, but of himself; and the verdict was for part for the King, and for part for the defendant. And the question was, who should pay the fees in court, &c. because the defendant is actor, for if it were found for the King, no judgment should be given; but if, &c. for the defendant, an *amoveas manus* must be awarded. And it was ruled by *Holt* chief justice at *Warwick Summer* assises 1699, that the defendant ought to pay the fees.

Rex vers. Goate.

IN an indictment for forgery at common law, though it is not shewn, that the party was prejudiced, yet the indictment is good. *Contra* in an action of *forger des faux faits*. Therefore where the indictment was for forgery of a surrender of the lands of J. S. and it was not shewn in the indictment, that J. S. had any lands; yet *Holt* chief justice at *Bury Summer* assises 12 Will. 3. upon motion in arrest of judgment held it good; and judgment was given against the defendant, being an attorney, that he should stand in the pillory. Another exception was, that the indictment was, *quod falso contrafecit falsum scriptum*, which is repugnant; yet held good.

Indictment for forgery at common law, and action of *forger des faux faits*, their difference.

IT was ruled by *Holt* chief justice at *Dorchester Lent* assises 10 Will. 3. that if A. possessed of a term for a hundred years, grants the land, *habendum* for forty years, to begin after his death; it is a good new lease: and a man possessed of a term for twenty years may grant the lands for nineteen years, to commence after his death; and it will be good for so many of the twenty years, as shall be unexpired at the time of his death.

A. possessed of a term of 100 years, grants for 40 years, to begin at his death, and good.

Rex vers. Webb.

IT was ruled by *Holt* chief justice at the fittings at *Westminster*, Hill. 9 W. 3. B. R. in an indictment for a nuisance, that the building of a house in a larger manner than it was before, whereby the street became darker, is not any publick nuisance by reason of the darkening.

No nuisance to build a house larger than it was before.

Waterman vers. Soper.

IT was ruled by *Holt* chief justice at *Lent* assises at *Winchester*, upon a trial at *nisi prius* 1697-8. 1. That if A. plants a tree upon the extremest limits of his land, and the tree growing extends its root into the land of B. next adjoining, A. and B. are tenants in common of this tree. But if all the root grows into the land of A. though the boughs overshadow the land of B. yet the branches follow the root, and the property of the whole is in A. 2. Two tenants in common of a tree, and one cuts the whole tree; though the other cannot have an action for the tree, yet he

In what case A. and B. are tenants in common of a tree, and where not.

And what remedy one has against the other who may cut it.

may have an action for the special damage by this cutting; as where one tenant in common destroys the whole flight of pigeons.

Spark *vers.* Spicer.

The owner of the land shall have the gibbet, &c. of one hung there.

MICH. 10 Will. 3. *per* Holt chief justice. If a man be hung in chains upon my land; after the body is consumed, I shall have the gibbet and chain. Said upon a motion for a new trial.

Property of a bill lost, found, and assigned for valuable consideration, how.

A Bank-bill was payable to *A.* or bearer, *A.* gave it to *B.* *B.* lost it, *C.* found it, and assigned it over to *D.* for valuable consideration, *D.* went to the bank and got a new bill in his own name, *A.* brought trover against *D.* for the former bill. And ruled by Holt chief justice at Guildhall 1698, that an action did not lie against *D.* because he had it for valuable consideration. *Ex relatione m'ri Daly.*

Trover lies against an attorney who detains a deed for his fees.

IT was ruled at a trial at *nisi prius* by Holt chief justice, Pasch. 6 Will. & Mar. that where *A.* purchased the interest of a lease for years, and the writings were left in the hands of *B.* an attorney, to draw an assignment of it; *B.* drew it, and it was sealed, but *B.* refused to deliver it, until *A.* paid for it; upon which *A.* brought trover against *B.* for the deed: that the action well lay; because *B.* might have an action for what he deserved, but he cannot detain for it. *Ex relatione m'ri Place.*

Frith *vers.* Torin.

Apprenticeship served beyond sea, excuses from 5 Eliz. though defendant not bound.

IT was ruled by Holt chief justice at Summer assises at Rygate 10 Will. 3. that the service of an apprenticeship seven years beyond the sea, though the defendant was not bound, excuses from the 5 Eliz. cap. 4.

Jones *vers.* Hart.

S. C. Salk. 441.

Trover against a pawn-broker though the pawning and tender was to his servant.

IT was ruled by Holt chief justice at Guildhall, Mich. 10 Will. 3. that if *A.* being a pawn-broker employs *B.* his servant in the way of his trade, and *B.* upon a pawn of goods lends money to *C.* *C.* tenders the money to *B.* at the day, and demands the goods, *B.* says, that the goods are sold; trover will lie for *C.* against *A.*

IF a ship be bound for the *East Indies*, and from thence to return to *England*, and the ship unlades at a port in the *East Indies*, and takes freight to return to *England*, and in her return she is taken by enemies; the mariners shall have their wages for the voyage to the *East Indies*, and for half the time that they stayed there to unlade, and no more. Ruled by *Holt* chief justice, June 4, 1700. at *Guildball* at *nisi prius*.

Teaching mariners wages, where ship is taken by enemies.

THE servants of a carman run over a boy in the streets, and maimed him, by negligence; and an action was brought against the master, and the plaintiff recovered. The servants of *A.* with his cart run against the cart of *B.* in which there was a pipe of wine, viz. sack, and overturned it, whereby the sack was spoiled, and run into the street; and an action was brought against the master, and held good by *Holt* chief justice at *Guildball*. *Ex relatione m'ri Place*.

A master carman is answerable for his servants negligence, and the damage thereby.

Wright vers. Wilson.

A. has a chamber adjoining to the chamber of *B.* and has a door that opens into it, by which there is a passage to go out; and *A.* has another door, which *C.* stops, so that *A.* cannot go out by that. This is no imprisonment of *A.* by *C.* because *A.* may go out by the door in the chamber of *B.* though he be a trespasser by doing it. But *A.* may have a special action upon his case against *C.* Ruled by *Holt* chief justice in evidence at a trial at the *Summer* assises at *Lincoln* 1699, in an action of false imprisonment. And the plaintiff was nonsuit.

What shall or shall not be an imprisonment.

Glenham vers. Hanby.

A. demised ground to *B.* which was pasture, except the trees; *B.* put in his cattle to feed, which barked the trees; *A.* cannot have trespass against *B.* Ruled by *Holt* chief justice upon a point made and referred to him at the assises at *Bury* in *Lent* 12 *Will.* 3. upon hearing of council several times, though at first he was of a contrary opinion.

Lease of ground except the trees, trespass lies not against lessee for his cattle barking the trees.

Masters

Masters vers. Butcher.

There must be a special warrant to justify the officer's imprisoning one for non-payment of taxes.

THE officer cannot justify the imprisonment of a man for nonpayment of taxes under the general printed warrant, which the collectors have, signed by two justices of peace. But they ought to have a special warrant. Ruled upon evidence at a trial in false imprisonment by *Holt* chief justice at *Norwich Summer assises*, 12 *Will.* 3.

Hatcher vers. Fineaux.

Ejectment. Statute of limitations, where it is no bar.

William Denne possessed of a term for a thousand years assigned it to *Ralph Philpot* for a collateral security against a bond in which *Philpot* was bound jointly with *Denne* for the debt of *Denne* in 1655. *Philpot* died leaving *R. Philpot* his son his executor. *William Denne* died leaving *Katherine Denne* his wife his executrix, and *Katharine Denne* his daughter his heir. In 1674 *R. Philpot* executor of *Ralph Philpot*, and *Katharine Denne* the executrix of *William Denne*, and *Katharine Denne* the heiress of *William Denne*, assigned this term of a thousand years to *John Harrison*, with condition that upon payment of 200*l.* the consideration of the said assignment, by *Katherine Denne* the executrix, &c. *Katharine Denne* received the profits till 1691, and she paid the interest to the same time. And *per Holt* chief justice it was ruled at *Maidstone Lent assises* 13 *Will.* 3. in an ejectment brought by the executor of *Harrison*, 1. That he was not barred by the statute of limitations, because the statute did not prejudice at the time of the assignment, there being but nineteen years elapsed; and then the joining of him in the assignment, who had the title to take advantage of the statute, gives a new title. 2. *Per Holt* chief justice, if a man makes a mortgage for collateral security, although the mortgagee is not in possession for twenty years and more; yet if the interest be paid upon the bond according to the agreement of the parties, it shall not be barred by the statute of limitations.

In what case a trust and term for years are both lost.

IT was held *per curiam*, Mich. 8 *Will.* 3. B. R. that if a term for years of lands be devised to executors in trust for payment of debts, if all the executors renounce, &c. and will not convey over to others, to the end that they may execute the trust; that the trust and term for years are both lost. *Ex relatione m^{ri} Shelley.*

Stocker *vers.* Berny.

IF *H.* has possession of land for twenty years uninterrupted, and then *B.* gains possession, upon which *H.* brings ejectment; though *H.* is plaintiff, yet his possession for twenty years will be a good title for him, as well as if *H.* had been then in possession; because possession for twenty years now by virtue of the statute 21 Jac. 1. cap. 16. is like a descent at common law, which tolls the entry. Ruled by *Holt* chief justice, *Summer* assizes at *Lincoln*, 11 Will. 3. 1699. and at *Aylesbury*.

Possession for twenty years is like a descent at law which tolls the entry.

Sparling executor Sparling *vers.* Smith.

IN *assumpsit*, upon *non assumpsit infra sex annos* pleaded, the evidence was, that after the six years the defendant assumed to pay, if the plaintiff would come to account. And it was ruled by *Holt* chief justice at *Hertford*, *Lent* assizes 1701. *March* 25. that this did not revive the promise, because it was not an actual promise.

Non assumpsit infra sex annos, promise to pay if plaintiff would come to account will not take it out of the statute.

Kirney *vers.* Smith & al'.

IT was ruled by *Holt* chief justice, at *Lent* assizes at *Thetford*, 16 Mar. 12 Will. 3. upon evidence at a trial at *nisi prius*, that a ship carpenter is within the statutes of bankrupts. But a case was made of it for his farther consideration. 2. *A.* becomes bankrupt, and then sells goods to *B.* *B.* sells them to *C.* which is a conversion; then a commission of bankrupt is sued, and an assignment made by the commissioners to *E.* who brings trover against *C.* *Per Holt*, the action well lies; but that point was also reserved for his consideration. 3. If the petition to the lord chancellor mentioned in the declaration recites, that the bankrupt was indebted 300*l.* and the petition produced at the trial recites, that he was indebted in 150*l.* yet that is no material variance. 4. There is no need to produce at the trial the petition made to the lord chancellor, because it may have been by *parol*, though the practice hath been otherwise.

A ship carpenter is within the statutes of bankrupts.

Property is in the assignees from the act of bankruptcy.

Petition need not be produced.

Sed quare?

Mead *vers.* Death and Pollard.

Where *indebitatus assumpsit* will not lie.

AN order was made at the quarter-sessions by the justices of peace, that a poor man should be removed from the parish of *Otton Belchamp* to the parish of *Walter Belchamp*, and that *Walter Belchamp* should pay to *Otton Belchamp* 6*l.* costs. The 6*l.* were paid accordingly. And afterwards the order was quashed in *B. R.* being removed thither by *certiorari*. Upon which the churchwardens of *Walter Belchamp*, who had paid the 6*l.* brought *indebitatus assumpsit* against the defendants, who had received it. And it being tried before *Tracy* baron of the Exchequer, *Lent* assizes 1700. Mar. 28. at *Chelmsford*, he held that *indebitatus assumpsit* would not lie. And he compared it to the case, where money is paid upon a judgment, and afterwards the judgment is reversed for error, *indebitatus assumpsit* will not lie for the money. And the plaintiff was nonsuit. But note also, that the 6*l.* were paid by the churchwardens and overseers of the poor, and this action was brought by the churchwardens alone.

Sir Richard Newdigate *vers.* Davy.

Indebitatus assumpsit lies for money paid in pursuance of a void authority.

SIR *Richard Newdigate* had a donative, which he gave to *Davy*; and afterwards he removed *Davy*, and put in *J. S.* *Davy* cited Sir *Richard Newdigate* in the time of *James II.* before the high commissioners, and there Sir *Richard Newdigate* had sentence against him, to restore *Davy*, and to pay him all the arrears that he had received. Sir *Richard Newdigate* paid it accordingly. And after the revolution Sir *Richard Newdigate* brought *indebitatus assumpsit* against *Davy* for this money, as received to his use. And it being tried at *nisi prius* in *Middlesex*, before *Treby* chief justice of the Common Pleas, he held, that the action well lay; for when money is paid in pursuance of a void authority, &c. *indebitatus assumpsit* lies for it. 4 or 5 *Will.* & *Mar.* *Ex relatione m'ri Place.*

Mendez *vers.* Carreroon.

Case upon a bill of exchange.

IN case upon a bill of exchange, upon the evidence at the trial before *Holt* chief justice at *Guildhall* Nov. 23. *Mich.* 12 *Will.* 3. the case was thus. *A.* drew a bill of exchange upon *B.* payable to *C.* at *Paris*; *B.* accepted the bill, *C.* indorsed it, payable to *D.* *D.* to *E.* *E.* to *F.* *F.* to *G.* *G.* demanded the bill to be paid by *B.* and

and upon non-payment *G.* protested it within the time, &c. and then *G.* brought an action against *D.* and it was well brought, and he recovered. Afterwards *D.* brought an action against *B.* and though *D.* produced the bill and the protest, yet because he could not produce a receipt for the money paid by him to *G.* upon the protest, as the custom is among merchants, as several merchants upon their oaths affirmed, he was nonsuit. But *Holt* seemed to be of opinion, that if he had proved payment by him to *G.* it had been well enough.

THE custom of merchants is, that if *B.* upon whom a bill of exchange is drawn, absconds before the day of payment, the man to whom it is payable may protest it, to have better security for the payment, and to give notice to the drawer of the absconding of *B.* and after time of payment is incurred, then it ought to be protested for non-payment the same day of payment or after it. But no protest for non-payment can be before the day that it is payable. Proved by merchants at *Guildhall, Trin. 6 Will. 3 Mar.* before *Treby* chief justice. And the plaintiff was nonsuit, because he had declared upon a custom, to protest for non-payment before the day of payment. *Ex relatione m'ri Place.*

Bill cannot be protested before the day it is payable.

Taffell and Lee vers. Lewis.

IN case of foreign bills of exchange the custom is, that three days are allowed for payment of them; and if they are not paid upon the last of the said days, the party ought immediately to protest the bill, and return it, and by this means the drawer will be charged: but if he does not protest it the last of the three days, which are called the days of grace; there, although he upon whom the bill is drawn fails, the drawer will not be chargeable; for it shall be reckoned his folly, that he did not protest, &c. But if it happens, that the last day of the said three days is a *Sunday* or great holiday, as *Christmas* day, &c. upon which no money used to be paid, there the party ought to demand the money upon the second day; and if it is not paid, he ought to protest the bill the said second day; otherwise it will be at his own peril, for the drawer will not be chargeable. Merchants in evidence at a trial at *Guildhall, Trin. 7 Will. 3.* before *Holt* chief justice, swore the custom of merchants to be such, which was approved by *Holt* chief justice. 2. There is no custom for the protest of inland bills of exchange, nor any certain time assigned by the custom for the payment of them; therefore the money ought to be demanded in reasonable time, after it is payable; and then if it is not paid the

The custom of merchants as to foreign bills of exchange.

Inland bills.

744 *Points resolved by Holt chief justice,*

the drawer will be charged. See the statute 9 Will. 3. cap. 17.
 Indorsee ac- 3. If the indorsee of a bill accepts but two pence from the ac-
 cepts 2 d. from ceptor, he can never after resort to the drawer. 4. The notes of
 the acceptor, goldsmiths (whether they be payable to order or to bearer) are
 he can never always accounted among merchants as ready cash, and not as bills
 resort to the of exchange. 5. The time of receiving money upon a goldsmith's
 drawer. note is immediately, or else it will be at the peril of him who has
 Goldsmith's the note. He who delivers over the note will not be charged, if
 notes confi- the goldsmith fail, as the drawer of a bill of exchange would be;
 dered as cash. but the receiver is supposed to give credit to the goldsmith, and the
 note is looked upon as ready money payable immediately; and if
 he does not like it, he ought to refuse it; but having accepted it,
 it is at his peril. [But note, if the party to whom the note is
 delivered demands the money of the goldsmith in reasonable time,
 and he will not pay it, it will charge him who gave the note.
 Hopkins v. Geary, Hil. 1 Ann. B. R. Guildhall.] 6. A goldsmith's
 note indorsed is as a bill of exchange against the indorser.

1 Stra. 450,
 508, 550,
 707.
 2 Stra. 910,
 1175, 1248.

Hopkins v.
 Geary,
 Farr. 139.

Tiley vers. Cowling.

Where a man
 may give in
 evidence a
 verdict be-
 tween two
 strangers, his
 wife shall not
 be a witness
 for either of
 those strangers
 in that cause.

MR. R. Vaughan sent a box with a hundred guineas, &c. in it
 by Tiley the Bath carrier to London, upon which box the
 direction was only, To Mr. Vaughan member of parliament.
 Tiley carried the box to London, and upon his arrival Cowling an
 inn-keeper in Piccadilly came to Tiley's inn for goods directed to be
 left at Cowling's house. Afterwards this box being lost, Tiley pre-
 tended that it was delivered to Cowling among other goods. Upon
 which Tiley brought an action of trover against Cowling. And at
 the trial at the sittings at Westminster before Holt chief justice,
 Mrs. Vaughan the wife of Mr. Vaughan was produced to be a
 witness, to prove what was in the box. And Holt chief justice
 refused to admit her to be a witness; because, whether Tiley re-
 covered or not, this verdict might be given in evidence by Mr.
 Vaughan in an action to be brought by him against Tiley, with
 oath made of what was sworn for Tiley in this trial. 13 Febr.
 14 Will. 3. 1701.

Dike vers. Polhill.

Register of a
 will refused in
 proof of a pe-
 digree, by
 Holt.

IN ejectment, upon the trial at Lent assises at Maidstone in 1701,
 the copy of the register of a will was produced in evidence, to
 prove a pedigree, and not to derive any title by the will; and also
 the probate of the same will was offered for the same purpose.
 But Holt chief justice refused to admit them. For, 1. As to the
 probate,

probate, it is only evidence of a will as to chattels. 2. He said, that there was the same reason to admit the copy of the register to be evidence, as the copy of court rolls, or of a register of a church; but the practice has been always otherwise, which he would not subvert: and therefore the copy of the register not being evidence to prove the will, it cannot prove the pedigree, because that depends upon the credit of its being a will, which is not proved by the copy of the register; therefore the evidence was denied to be admitted by him. But afterwards, the same circuit at the assises at *East Grinstead*, in an issue directed out of Chancery to try in a feigned action, heir or not, the said probate was offered to Baron *Tracy*, to prove the pedigree; and he admitted it, notwithstanding the other case was cited to be ruled as aforesaid; because he said, the other case was in ejectment, and this only in case; and he could not know, that the title of the land would come in question, &c. But it seems to me, that there is no difference, because the title to the land was not derived by the will in the ejectment.

Pasch. 6 Will. & Mar. B. R. it was said *per curiam*, that a shop book is not evidence for the tradesman, but is good evidence against him, or for a stranger. The same law of a scrivener's book for money paid by him, or received to the use of a stranger, or the book of a burser of a college. *Ex relatione m^ri Place.*

Selby vers. Harris.

IT was ruled by *Treby* chief justice of the Common Pleas at *Guildhall, Pasch. 10 Will. 3.* that if at the trial at *nisi prius* a rule of the court of Common Pleas or King's Bench be produced under the hand of the proper officer, there is no need to prove it to be a true copy, because it is as an original. 2. A copy of an entry in the books of the office of faculties was then disallowed to be evidence, wherefore the book itself was produced.

Kingston vers. Grey.

Pasch. 8 Will. 3. at *Guildhall*, a creditor was admitted by *Holt* chief justice to prove his bond, and the debt due upon it, upon *plene administravit* pleaded, he having before received it of the administrator, and delivered up the bond.

Taylor *vers.* Jones.

S. C. Talk.

389.

Copy of in-
rolment of a
deed of uses
is *prima facie*
evidence, and
ought not to
be refused.

MICH. 8 Will. 3. C. B. in ejectment, a motion was made for a new trial, because the party against whom the verdict was given, produced in evidence a fine, and a copy of the inrolment of a deed, which led the uses of it. And *Rokeby* justice, before whom it was tried, refused to admit this copy of the inrolment to be evidence. And resolved *in C. B.* that such copy is evidence *prima facie*; but the party shall not be estopped by it, as by the record, but may controvert it, as forged, &c. because inrolment was at common law, and that for some purpose. And they relied upon Mr. *Kendal's* case. [See it now reported 3 *Lev.* 387.] And of this opinion *Powell* justice was generally. But *Treby* chief justice doubted, whether such evidence generally speaking was evidence. But here he agreed with the other justices, *viz.* *Powell* and *Nevill*; because it was only to lead the uses of the fine, which might be done by parol.

Chettle *vers.* Pound.

Where *nil*
habuit in tene-
mentis may be
given in evi-
dence.

DEBT for rent. Upon *nil debet* pleaded, the plaintiff gave in evidence a note in writing, by which the defendant agreed, to hold for one year, rendering rent of 15 *l.* And in fact he was grantee of a reversion expectant upon an estate for life, which life was dead at the time of the giving of the note. Which grant was forty years before, and he was never in possession, but the tenant for life was all the time in possession during his life. The defendant gave in evidence a *prior* grant of the said reversion. And it was ruled by *Holt* chief justice, that the defendant in this case may give in evidence, *nil habuit in tenementis*, the plaintiff having never been in possession, notwithstanding the note signed by the defendant, by which he agreed to hold, &c. But if the plaintiff had been in possession, though but tenant at will, &c. then the defendant could not have given this in evidence without having been evicted. Lent assises *Maidstone*, 13 Will. 3. 1701. And the plaintiff was nonsuit.

F I N I S.

A
T A B L E
O F

The Principal Matters

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